LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 22, 1963
CERTIORARI GRANTED APRIL 22, 1963

INDEX TO APPENDIX

	Page
Warrant of Arrest (Served March 31, 1961)	2a
Order to Show Cause and Notice of Hearing (Served March 31, 1961)	3a
Additional Charge of Deportability (Served April 19, 1961)	8a
Transcript of Hearing Before Special Inquiry Officer Abe Gold, at United States Penitentiary, Atlanta, Georgia, May 23, 1961	10a
Decision and Order of the Special Inquiry Officer, of June 21, 1961, directing deportation	42a
Notice of Appeal to Board of Immigration Appeals (mailed June 29, 1961)	63a
Decision and Order of Board of Immigation Appeals, of January 2, 1962, dismissing petitioner's appeal and directing his deportation	65a
Notice of direction of deportation to Italy, dated January 11, 1962	91a
Petition for Review of Deportation Order, mailed for filing June 5, 1962	92a
Indictment and Judgment of Conviction of Income Tax Evasion in Southern District of New York, dated May 17, 1954	95a
Prosecutor's Summation in Income Tax Evasion Trial	99a
Judgment of United States Court of Appeals for Second Circuit on Appeal from Income Tax Evasion conviction, dated April 5, 1955	124a

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit	126	126
Opinion, Medina, J.	126	126
Judgment	137	136
Clerk's certificate (omitted in printing)	139	136
Order allowing certiorari	140	137

APPENDIX

Warrant for Arrest of Alien

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Atlanta, Georgia

No. A12 143 440

To any officer in the service of the United States Immigration and Naturalization Service

WHEREAS, from evidence submitted to me, it appears that the alien Frank Costello alias Frank Castiglia who entered this country at Houston, Texas, on — the 20th day of September, 1948, is within the United States in violation of the immigration laws thereof, and is therefore liable to being taken into custody as authorized by section 242 of the Immigration and Nationality Act.

NOW, THEREFORE, by virtue of the power and authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I hereby command you to take the above named alien into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations. The expenses of detention hereunder, if necessary, are authorized payable from the available appropriation "Salaries and Expenses, Immigration and Naturalization Service."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 31st day of March, 1961.

William N. Owens,
District Director

Served by me at Atlanta, Georgia on March 31, 1961 at 11:55 A.M. I certify that following such service, the alien was advised as to right of counsel and was furnished with a copy of this warrant.

Charles M. Lowe
Gen. Investigator

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Order to Show Cause and Notice of Hearing

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA

In the Matter of

FRANK COSTELLO alias FRANK CASTIGLIA
Respondent.

File No. A12 143 440

To: Frank Costello
United States Penitentiary
Atlanta, Georgia.

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Italy and a citizen of Italy;

3. You entered the United States at New York, N. Y. on or about April 2, 1895;

See continuation sheet No. 1 attached hereto and made a part hereof.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

See continuation sheet No. 2 attached hereto and made a part hereof.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at U. S. Penitentiary, Atlanta, Georgia on April 10, 1961 at 10 a.m., and show cause why you should not be

deported from the United States on the charge(s) set forth above.

Immigration and Naturalization Service
William N. Owens
District Director
Atlanta, Georgia

Dated: March 31, 1961

NOTICE TO RESPONDENT

The Copy of This Order Served Upon You Is Evidence of Your Alien Registration While You Are Under Deportation Proceedings. The Law Requires That It Be Carried With You At All Times.

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you will be permitted, if you wish, to admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

Whether or not you admit your deportability, you will have an opportunity at the hearing to apply for any discre-

tionary relief from deportation to which you believe you are entitled.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

.....
(signature of respondent)

.....
(date)

Before: .....
(signature and title of witnessing officer)

CERTIFICATE OF SERVICE

This order and notice were served by me on March 31, 1961 in the following manner:

Personal service on Respondent and his Attorney R. W. Bergan of 1000 Hill Bldg., Washington, D. C., associated with Edward Bennett Williams, Esq.

Charles M. Lowe
Gen. Investigator

CONTINUATION SHEET #1

4. You entered the United States at Houston, Texas on September 20, 1948;

5. You were born on January 26, 1891 at Cosenza, Italy;

6. The United States District Court, Southern District of New York, N. Y., entered an order admitting you to United States citizenship on September 10, 1925 and issued you certificate of naturalization No. 2136470;

7. The order admitting you to United States citizenship was vacated and set aside and your certificate of naturalization canceled in the United States District Court, Southern District of New York, by a judgment entered on March 9, 1959, and which was affirmed by the United States Supreme Court on February 20, 1961;

8. You were convicted on May 17, 1954 in the United States District Court, Southern District of New York for wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1948 by filing a false and fraudulent joint income tax return on or about January 14, 1949;

9. You were convicted on May 17, 1954 in the United States District Court, Southern District of New York, for wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1949 by filing a false and fraudulent joint income tax return on or about March 10, 1950;

10. You were for each such conviction on May 17, 1954, sentenced to imprisonment for a period of five (5) years to run concurrently with each other;

11. You were convicted on April 8, 1952 in the United States District Court, Southern District of New York, N. Y., of the offense of wilfully refusing on March 15 and 16, 1951 to answer certain questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce in violation of Title 2, section 192, United States Code;

12. You were for this conviction on April 8, 1952 sentenced to imprisonment on one count for a period of one year and on other counts for periods aggregating six months;

CONTINUATION SHEET #2

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1948 by filing a false and fraudulent joint income tax return on or about January 14, 1949; wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1949 by filing a false and fradulent joint income tax return on or about March 10, 1950; both in violation of section 145(b) of Title 26 of the United States Code; and wilfully refusing to answer certain questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce in violation of Title 2, section 192, United States Code; and

Section 241(a)(4) of the Immigration and Nationality Act, in that you have been convicted of a crime involving moral turpitude committed within five years after your entry on September 20, 1948 and sentenced to confinement therefor in a prison or corrective institution for a year or more, to wit, wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1948 by filing a false and fraudulent joint income tax return on or about January 14, 1949; wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1949 by filing a false and fraudulent joint income tax return on or about March 10, 1950; both in violation of section 145(b)

of Title 26 of the United States Code; and wilfully refusing to answer certain questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, in violation of Title 2, section 192, United States Code.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No. A-12 143 440

UNITED STATES OF AMERICA:

In the Matter of

FRANK COSTELLO alias FRANK CASTIGLIA
Respondent

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

To: Frank Costello
United States Penitentiary
Atlanta, Georgia.

Additional Charge of Deportability

In addition to the deportation charges contained in the Order to Show Cause and Notice of Hearing served upon you on March 31, 1961, at the United States Penitentiary, Atlanta, Georgia, you are hereby charged with being subject to deportation pursuant to the following provisions of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1948 by filing a false and fraudulent joint income tax return on or about January 14, 1949; wilfully and knowingly attempting to defeat and evade a large part of the income tax due

and owing by you and your wife to the United States of America for the calendar year 1949 by filing a false and fraudulent joint income tax return on or about March 10, 1950; both in violation of section 145(b) of Title 26 of the United States Code; wilfully refusing to answer certain questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce in violation of Title 2, section 192, United States Code; and Criminal Contempt of Court pursuant to sections 750 and 751 of the Judiciary Law of New York.

In support of this additional charge of deportability it is alleged, in addition to the allegations set forth in the Order to Show Cause and Notice of Hearing, that

13. You were convicted on May 7, 1957 in the Court of General Sessions of the County of New York, N. Y., of criminal contempt of court for contumacious and unlawful refusal to answer legal, proper and relevant questions propounded to you by the Grand Jury of the County of New York, N. Y., in connection with an investigation to determine whether there has been a conspiracy to commit the crime of murder.

At your hearing before the Special Inquiry Officer at the United States Penitentiary, Atlanta, Georgia, on May 9, 1961, you will also be required to show cause why you should not be deported from the United States on the additional charge set forth above.

William N. Owens
District Director
Atlanta, Georgia.

April 18, 1961

CERTIFICATE OF SERVICE

This notice was served by me on April 19, 1961 in the following manner: Personal Service.

Charles M. Lowe
Gen. Investigator

PROCEEDINGS

Q. (Special Inquiry Officer, Mr. Gold) Are you Mr. Frank Costello? A. Yes, sir.

Q. Do you have a number in the United States Penitentiary, sir? A. Yes.

Q. What is it, please? A. 80973.

Q. The purpose of this hearing is to determine whether or not you should be deported from the United States. Do you understand that, sir? A. Yes, sir.

Q. Will Counsel please identify himself? A. (Mr. Williams) My name is Edward Bennett Williams of Washington, D. C. and my associate is Harold Ungar of Washington, D. C.

Q. Is your business address 1000 Hill Building, Washington, D. C.? A. That is correct.

Q. 839 17th Street, N. W.? A. That is correct.

Q. And yours, Mr. Ungar? A. (Mr. Ungar) The same.

Q. The government claims that you are an alien, a native and citizen of Italy; you entered the United States at New York City on or about April 2, 1895 and again entered the United States at Houston, Texas on September 20,

2 1948; that you were born on January 26, 1891 at Cosenza, Italy. I am reading to you the allegations of fact and trying to put them into simple language, sir. Then, the government goes on to say that the U. S. District Court, Southern District of New York admitted you to citizenship on September 10, 1925 and that your citizenship was taken away by an order of the United States District Court, Southern District of New York on March 9, 1959. This decision was affirmed by the United States Supreme Court on February 20, 1961; that you were convicted on May 17, 1954 in the United States District Court, Southern District of New York for wilfully and knowingly attempting to evade income taxes for the year 1948, and again convicted on the same day on the same charge for evading—

for attempting to evade income taxes for the calendar year 1949. That is a year later; and that for each conviction, you were sentenced May 17, 1954—that is the same date on which these two convictions occurred, sentenced to imprisonment for a period of five years, the two sentences to run concurrently; and the next allegation, which is number 11, is that you were convicted on April 8, 1952 in the United States District Court, Southern District of New York for wilfully refusing to answer questions asked you by a United States Senate Special Committee and that you were—and for this conviction you were sentenced on April 8, 1952 to serve a period of one year on one count, and a period of six months on other counts. Because of these allegations of fact, the government claims you are deportable under two different sections of law.

The first charge of deportability, Section 241(a)(4) of the Immigration and Nationality Act, based upon the claim that you were convicted of at least two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct; the crimes being the two convictions for attempting to evade payment of income taxes and the conviction for wilfully refusing to answer questions of the United States Senate Special Committee. Now, these two crimes must involve moral turpitude. Moral turpitude means crimes that are serious in nature, they are contrary to justice, honesty, morals. The Courts have held that a crime involving moral turpitude must be base, vile or depraved. In simpler language perhaps it means a crime that is either dishonest, immoral or disgusting or contemptible, and these crimes under the law must not arise out of a single scheme of criminal misconduct. That means that the crimes must be separate acts, separate crimes, not related, not the result of one single scheme or plan. Do you follow me, Mr. Costello? A. Yes, surely.

Q. The second charge of deportability is under the same section of law and is based upon the claim that you have been convicted of a crime involving moral turpitude com-

mitted within five years after your entry on September 20, 1948, as a result of which, you were sentenced to confinement therefor in a prison or corrective institution for a year or more, and that crime is the attempt to evade the payment of income taxes for the calendar year 1948, and likewise the crime in evading, attempting to evade payment of income taxes for the calendar year 1949; and in addition, the government claims that the crime for which you were convicted consisted of a charge of refusal to answer questions before the United States Senate Special Committee, which is also included. Whether all this is so or not is why we are here to find out. Do you understand everything I have explained? A. Absolutely.

Q. Now, in addition to that, the government later added one allegation of fact and another charge of deportability. This additional allegation of fact is number 13 and it states that you were convicted on May 7, 1957 in the Court of General Sessions of the County of New York for criminal contempt of Court in that you refused to answer questions put to you by a Grand Jury in the County of New York in connection with an investigation to determine whether there had been a conspiracy to commit murder, and because of this new allegation of fact, the government added this charge under the same statute, Section 241(a)(4) of the Immigration and Nationality Act, claiming that you are deportable under this law because after entry you have been convicted of two crimes involving moral turpitude, again, not arising out of a single scheme of criminal misconduct. Then it names the two income tax convictions, the conviction that arose because of your refusal to answer questions before the Senate Committee and then it adds on this last crime, for criminal contempt of Court. Is there anything you would like to have me explain to you again that you feel you do not understand? A. No.

Q. These are the allegations of fact, charges of deportability and we are here to try to find out if they are correct? A. I understand everything you told me.

Q. The Order to Show Cause and Notice of Hearing which consists of three pages, and then the additional allegations and charge, consisting of one additional page, are all entered into evidence as *Exhibit No. 1*, in this hearing.

Q. Will you please rise and raise your right hand to take the oath? A. (Respondent complies).

Q. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God? A. Yes, sir.

Q. You may be seated. Now, I shall read to you all of the 14 allegations of fact one at a time and ask you whether they are true and correct.

Mr. Williams: Mr. Examiner, I have advised the respondent not to answer questions at this time and I shall undertake to state the respondent's position on each of these factual allegations.

Q. Mr. Williams, under the regulations I am required to read the allegations to the—under the applicable
6 regulations. I have no choice but to read the allegations and to await an answer from Mr. Costello. If you wish to give him any advice, that is up to you. A. I have no objection to your reading factual allegations to him of course, but I am going to advise him in each instance not to respond to these questions at this time. At the same time tell me with respect to each allegation if you wish to hear from me. If not, I will remain silent.

Q. You may state what you wish. Number 1. The government alleges that you are not a citizen or national of the United States. Is that true and correct? A. (Mr. Williams) The respondent concedes that factual allegation as a result of the final order entered in his denaturalization case.

Q. Number 2. That you are a native of Italy and a citizen of Italy? A. (Mr. Williams) The respondent concedes that he is a native of Italy, Mr. Examiner, but he denies that he is a citizen of Italy and in that frame of reference I should like to call your attention, so there will be no misunderstanding about the Alien Registration form which

he signed while an inmate in this institution a few weeks ago, in response to question number four, I don't think I should characterize it as a question, "I am a national or citizen or subject of" and the word Italy was added. It is not conceded that he is a citizen of Italy. It is expressly denied that he is a citizen of Italy. It is not our
7 intention to concede that he is.

Q. (Examining Officer, Morris Perlovsky) My name is Morris Perlovsky. I am entering an appearance on behalf of the Immigration and Naturalization Service. May I have something about your statement clarified? You said to the form was added Italy. Do you mean by the respondent? A. (Mr. Williams) Yes, at that time it was Mr. Costello, the respondent who added that. Yes.

Q. (Mr. Gold) Number 3. You entered the United States at New York, N. Y. on or about April 2, 1895. Number 4. You entered the United States at Houston, Texas on September 20, 1948. A. (Mr. Williams) The respondent is without knowledge as to the precise date on which he entered the United States at Houston, Texas. He concedes that he has made an entry into the United States, at Houston, Texas, but he is not certain of the date. In making this concession, Mr. Examiner, I don't want to have it construed that we are conceding that this allegation has any relevancy to this hearing because it will be our position on the law that this does not have relevancy to the proceeding.

Q. Can you give an approximate date? A. (Mr. Williams) His best recollection, Mr. Examiner, is that it was between 1946 and 1948 and I think if his recollection is refreshed by the document that he will concede the specific date shown by the document if it appears to be authentic.

Q. No. 5. You were born on January 26, 1891 at Cosenza, Italy. A. (Mr. Williams) To the best of the re-
8 spondent's recollection he was born at Cosenza, Italy on January 26, 1891.

Q. Number 6. The United States District Court, Southern District of New York, N. Y., entered an order admitting

you to United States citizenship on September 10, 1925 and issued you certificate of naturalization No. 2136470. A. (Mr. Williams) The respondent concedes that allegation, Mr. Examiner.

Q. Number 7. The order admitting you to United States citizenship was vacated and set aside and your certificate of naturalization canceled in the United States District Court, Southern District of New York, by a judgment entered on March 9, 1959, and which was affirmed by the United States Supreme Court on February 20, 1961. A. (Mr. Williams) The respondent, Mr. Examiner, concedes the allegation you just read.

Q. Number 8. You were convicted on May 17, 1954 in the United States District Court, Southern District of New York for wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1948 by filing a false and fraudulent joint income tax return on or about January 14, 1949. A. (Mr. Williams) Mr. Examiner, it will be the respondent's position in this hearing that evidence of such a conviction is not admissible in this hearing because of the fact that evidence of such a conviction flows as the fruit of the poisonous tree, from wire tapping and violation of the Federal Mail Statutes. It will be our further position, Mr. Examiner, that to use a conviction predicated upon wire-tapped evidence and upon violation of the Mail Statutes for purposes of deportation would be violative of the defendant's legal and constitutional rights. That is a question of law of course, on which you do not wish to hear our argument at this point, but that will be our ultimate position.

9

Q. Are you acknowledging that this is a fact, the conviction did occur? A. (Mr. Williams) Mr. Examiner, I must be most careful about this because I don't want to concede a fact which the government will then say is a substitute for the offering of evidence and I feel that evidence of this

conviction is inadmissible in this hearing for legal reasons, and accordingly, I feel I must advise the respondent at this time not to make a concession, nor are we prepared to make one for him on this allegation.

Q. Number 9. You were convicted on May 17, 1954 in the United States District Court, Southern District of New York, for wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1949 by filing a false and fraudulent joint income tax return on or about March 10, 1950. A. (Mr. Williams) Mr. Examiner, it is the respondent's position that evidence to support allegation number 9 is not admissible in this hearing for the same reasons that I have outlined with respect to allegation number 8. It is our contention that such evidence is not admissible in this hearing because it would be the result of violation of the wiretapping statutes and a violation of the mail statutes of the United States, and accordingly we take the same position with respect to allegation 9 which I have heretofore outlined on allegation 8.

Q. Number 10. You were for each such conviction on May 17, 1954, sentenced to imprisonment for a period of five years to run concurrently with each other. A. (Mr. Williams) Our position with respect to allegation number 10, Mr. Examiner, follows of course, the same as it was with respect to allegation number 8 and 9.

Q. Number 11. You were convicted on April 8, 1952 in the United States District Court, Southern District of New York, N. Y., of the offense of wilfully refusing on March 15 and 16, 1951 to answer certain questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce in violation of Title 2, section 192, United States Code. A. (Mr. Williams) It is our position with respect to allegation number 11, Mr. Examiner, that evidence to support that allegation would not be admissible because it would be the result of violations of

the wire-tapping statutes of the United States and accordingly, the respondent does not make a concession with respect to allegation number 11.

Q. Number 12. You were for this conviction on April 8, 1952 sentenced to imprisonment on one count for a period of one year and on other counts for periods aggregating six months. A. (Mr. Williams) Our position with respect to allegation number 12, Mr. Examiner, is the same as the position which I have articulated for allegation number 11.

Q. Number 13. I think I mentioned earlier that there were 14 allegations. If I did, I was in error. This is the 13th and last allegation. You were convicted on May 7, 1958 in the Court of General Sessions of the County of New York, N. Y. of criminal contempt of court for contumacious and unlawful refusal to answer legal, proper and relevant questions propounded to you by the Grand Jury of the County of New York, N. Y., in connection with an investigation to determine whether there has been a conspiracy to commit the crime of murder. A. (Mr. Williams) It is the position of the respondent, Mr. Examiner, with respect to allegation number 13, that evidence to support that allegation would not be admissible in this hearing because it would constitute a violation of the respondent's rights under the 4th, 5th and 6th amendments of the Constitution of the United States to admit such evidence. Further, Mr. Examiner, we do not concede that there was a conviction of a crime on May 7, 1957 in the Court of General Sessions of the County of New York. That, I think I should say in fairness to the Examiner, the last portion which I have articulated is a question of law on which we are prepared to submit briefs at the appropriate time.

Q. Of course you are not conceding any of the three charges of deportability? A. (Mr. Williams) No, sir.

Mr. Gold: Mr. Perlovsky.

Q. (Mr. Perlovsky) Mr. Costello, just before you were naturalized as a citizen of the United States on Sep-

tember 10, 1925, were you a citizen of Italy?

12 A. (Mr. Williams) I am going to advise Mr. Costello not to answer questions that are propounded to him at this time.

Q. Mr. Costello, do you deny at this time that just before you were naturalized as a citizen of the United States, on September 10, 1925, that you were a citizen of Italy? A. (Mr. Williams) I give the respondent the same advice that I have heretofore given to him, that he does not have to give evidence against himself in this hearing.

Q. Mr. Costello, are you here in this institution, United States Penitentiary, Atlanta, Georgia, serving a five-year term of imprisonment imposed upon your conviction on May 17, 1954; that is for the offenses in allegations number 8 and 9 of the Order to Show Cause? A. (Mr. Williams) I am going to give the respondent the same advice I have heretofore given to him. I ask him to decline to answer those questions.

Q. Do you deny, Mr. Costello, that you are here in the United States Penitentiary, Atlanta, Georgia, serving a five-year term of imprisonment for the offenses of wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by you and your wife to the United States of America for the calendar year 1948 by filing a false and fraudulent joint income tax return on or about January 14, 1949 and again on or about March 10, 1950, for which you were convicted on May 17, 1954? A. (Mr. Williams) I advise the respondent to decline to answer on the same grounds.

13 Q. Do you deny, Mr. Costello that for each such conviction on May 17, 1954 for the offenses I just described, that you were sentenced to imprisonment for a period of five years to run concurrently with each other? A. (Mr. Williams) I advise the respondent for the same reason to decline to answer.

Q. Mr. Costello, were you convicted on April 8, 1952 in the United States District Court, Southern District of New York for the offense of wilfully refusing on March 15 and

16, 1951, to answer certain questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce in violation of Title 2, section 192, United States Code? A. (Mr. Williams) I advise the respondent to decline to answer that question for the reasons that I have heretofore articulated; that he is not required to give evidence in this hearing against himself, and the further acts about which you have interrogated him are the result of violations of the federal wire-tapping statutes and the federal mail statutes.

Q. Mr. Costello, do you deny that you were so convicted? A. (Mr. Williams) I give him the same advice I have given him heretofore, for the same reasons.

Q. Mr. Costello, were you for this conviction, on April 8, 1952, sentenced to imprisonment on one count for a period of one year and other counts periods aggregating six months? A. (Mr. Williams) I give the respondent the same advice I have heretofore given him, for the same reasons.

14 Q. Mr. Costello, were you on May 7, 1957 in the Court of General Sessions of the County of New York, N. Y. convicted of criminal contempt of court for contumacious and unlawful refusal to answer legal, proper and relevant questions propounded to you by the Grand Jury of the County of New York, N. Y. in connection with an investigation to determine whether there has been a conspiracy to commit the crime of murder? A. (Mr. Williams) I advise the respondent to decline to answer the question on the ground that he does not have to give answers to assist in his own deportation and on the ground that such evidence would be taken in violation of the 4th, 5th and 6th Amendments to the Constitution of the United States.

Q. Mr. Costello, do you deny that you were so convicted? A. (Mr. Williams) I give him the same advice I gave him on the previous answer.

Q. Are you married Mr. Costello? A. (Mr. Williams) I give him the same advice I have heretofore given him.

I shall continue to give them so long as he is called as a witness in this proceeding at this time.

Q. Do you deny you are married Mr. Costello? A. (Mr. Wiliams). I give him the same advice to refuse to answer questions that are propounded to him at this stage of the proceeding.

Q. Did you make an entry into the United States from Mexico by plane in 1948? A. (Mr. Williams) I advise the respondent not to answer the question on the grounds heretofore asserted.

Q. Mr. Costello, it has been conceded for this record, by your Counsel, that you were outside of the United States since your entry into the country about 1895, but that the date was not certain. Was it in 1948 that you made this reentry, Mr. Costello? A. (Mr. Williams) I advise the respondent not to answer these questions propounded to him for the reasons I have heretofore asserted.

Q. Did you make an entry into the United States from Mexico, Mr. Costello? A. (Mr. Williams) I give him, Mr. Costello, the same advice I have given him heretofore, to decline to answer.

Q. Mr. Costello, was your wife's name Loretta Giegerman? A. (Mr. Williams) I give him, Mr. Costello, exactly the same advice as I shall continue to give during this interrogation at this time.

Q. Mr. Costello, was your wife's name Loretta Giegerman? A. (Mr. Williams) I give him the same advice, Mr. Examiner, to decline to answer questions propounded to him.

Q. Mr. Costello, do you deny your wife's maiden name was Loretta Giegerman? A. (Mr. Williams) I give Mr. Costello the same advice. I don't think it serves a useful purpose to repeat the question three times.

Q. Does your wife have a brother named Dudley Giegerman? A. I advise Mr. Costello, the respondent, to decline to answer questions propounded to him at this time by

Government Counsel for the same reasons that I have given heretofore.

16 Q. Mr. Costello, do you deny that you have a brother-in-law in New York by the name of Dudley Giegerman? A. (Mr. Williams) I give him, Mr. Costello, the same advice to exactly the same question that has just been asked.

Q. Were you married to Loretta Giegerman on September 23, 1914? A. (Mr. Williams) I advise Mr. Costello not to answer questions at this time for reasons that I have heretofore given.

Q. Do you deny that you were married on that date to Loretta Giegerman? A. (Mr. Williams) It is the same question that was just asked him and I give him the same advice.

Q. It is not the same question, Mr. Williams. A. (Mr. Williams) The distinction escaped me, Mr. Examiner.

Q. Does your wife live at 115 Central Park West, New York? A. (Mr. Williams) I give him the same advice Mr. Examiner that I have heretofore given.

Q. Was that where you lived in 1948, Mr. Costello? A. (Mr. Williams) I advise you to decline to answer any questions at this time.

Q. Mr. Costello, do you deny that in the year 1948 your home address was 115 Central Park West, New York, N. Y.? A. (Mr. Williams) I advise the respondent not to answer any questions at this stage of the proceedings for the reasons that I have advanced.

Q. Mr. Costello, I show you a certified copy of a Petition for Naturalization of Frank Costello, born January

17 26, 1891 at Cosenza, Italy, filed in the United States District Court, New York, on May 1, 1925. Does this relate to you? A. (Mr. Williams) Mr. Examiner, I say to you at this time that I am going to continue to advise the respondent that he does not have to answer questions propounded to him by Government Counsel in its effort to get a deportation order against him. It isn't my desire to stand

on technicalites. I am perfectly willing as Counsel, to stipulate that this is the Petition for Naturalization but I am going to continue in my advice to respondent not to reply to questions propounded by the government through its Counsel in an effort to deport him. I, as Counsel, will stipulate, if it is Mr. Perlovsky's desire to get it into the record, that it is the Petition for Naturalization which was executed by the respondent in 1925. I should say, it is not the petition, it appears to be the photostat of the petition.

Q. Certified copy. A. (Mr. Williams) A copy.

Q. Will you also stipulate Counsel that all the facts in this petition, which appear in this petition, relate to the respondent and they are true to the best of your knowledge and belief? A. (Mr. Williams) Are you saying this is an exact copy?

Q. Yes. A. (Mr. Williams) What are you asking, if this is a true copy?

Q. No, whether all facts in it are true? A. (Mr. Williams) I have urged several courts in the last few years that all facts in this Petition for Naturalization were true.

I was unsuccessful to get them to agree with me. I
18 am glad to find someone who does agree with me, and I will stipulate.

Mr. Perlovsky: We offer this evidence in the record.

Mr. Gold: Photostatic copy of the Petition for Naturalization is entered as ***Exhibit No. 2.***

Q. (Mr. Perlovsky) Mr. Gold, I show respondent and his Counsel, Mr. Williams, and then offer in evidence, certified copy of an order of the United States District Court, Judge Archie O. Dawson, setting aside—cancelling and setting aside the order admitting Frank Costello to United States citizenship. A. (Mr. Williams) Mr. Examiner, we conceded the allegation of paragraph 7 and when we conceded that we eliminated that as an issue in the hearing. It seems to me we conceded there was an order issued by the Southern District of New York which was subsequently affirmed by the Supreme Court.

Mr. Gold: Well then, I certainly see no harm in admitting it into evidence and it is admitted as *Exhibit No. 3.*

Q. (Mr. Perlovsky) Now, in connection with Exhibit No. 3 and as related to it, and also to allegation number 7, and on the grounds, sir, that there is a material and relevant relationship thereto, I offer in evidence the following. The opinion of Judge Dawson dated February 20, 1959 revoking the same citizenship pursuant to which this order of March 9, 1959 was entered by Judge Dawson. Also, the affirming order in the matter by the United States Supreme Court entered February 20, 1961, and the original complaint filed in the case on May 1, 1958. All are authenticated certified copies. A. (Mr. Williams) Mr. Examiner, I
19 would like to make my position clear on this. We have conceded that this respondent was denaturalized by an order of court, United States District Court for the Southern District of New York, which was subsequently affirmed by the Supreme Court of the United States. If Mr. Perlovsky is offering these documents solely to buttress his contention that Mr. Costello was denaturalized, I have no objection. But, if he is offering these documents for any of the truths of statements of facts contained therein as relevant to this deportation hearing, then I think we should know what they are before I am asked to agree to admissibility. I don't dispute admissibility if going in solely for the purpose of showing respondent has been denaturalized, because this has been conceded.

Q. (Mr. Perlovsky) It is offered to show basis for denaturalization and also the effect of it, sir, in matters which relate to this proceeding.

Mr. Williams: I don't think the basis of denaturalization has any relevancy, Mr. Examiner, and I think the effect of denaturalization is a legal question to be resolved and is not appropriate for factual demonstration by any evidence. I don't object to these if they are offered to show the fact of denaturalization, but if offered for other reasons, then I think they are not admissible for other reasons.

Mr. Perlovsky: There is this to be considered, Mr. Gold, there is an issue in this case. I believe the record should contain them so that these legal questions may be properly resolved.

Mr. Williams: May I address a question to Mr. Perlovsky?

Mr. Perlovsky: I will tell you what I need. You have said that as far as the 1948 entry is concerned, or subsequent entry made by the respondent, is in effect not effective. I have considered possibly that you might have regarded the fact that he had been a citizen at the time he made the entry it is not effective. If that is the case, I believe this evidence is material to that issue. If you have that in mind——

Mr. Williams: I think that is a legal question. I don't think that will be resolved in any evidence.

Mr. Gold: I don't believe that was discussed by the Supreme Court.

Mr. Perlovsky: There is a discussion in that decision which may have a bearing on that issue.

Mr. Ungar: I would suggest, if you say there is something that has a direct bearing on these issues that you point to it.

Mr. Perlovsky: It is not my intention to argue the legal aspects of this case but——

Mr. Williams: Our position, Mr. Examiner, is that what some judge, in passing upon the denaturalization case may have said in his review of facts certainly can't have a factual bearing in the deportation hearing in which an altogether different issue is before the Examiner.

Mr. Gold: Of course the word, "entry" is something that has been defined judicially in some cases as you must know. Mr. Williams, are you making a specific objection to the use of these documents?

Mr. Williams: Here is my position. My position is this, Mr. Examiner, we conceded the fact of denaturalization. Thereafter Mr. Perlovsky, on behalf of the government, offered Judge Dawson's order.

Now he offers the opinion of the Supreme Court, the complaint filed by the government in 1958, and third, the opinion of Judge Dawson. Now, if he is offering these documents for something other than to show denaturalization, we object to it.

Mr. Gold: In other words, you are offering this to show facts, is that correct?

Mr. Perlovsky: To show—— Exhibit 3, may I see that?

Mr. Gold: Are you using this as offering of law or facts?

Mr. Perlovsky: Of facts, sir:

Mr. Gold: All right, let's stop there.

Mr. Williams: Then I object to them if he is offering them as facts. I object to them.

Mr. Perlovsky: The fact of denaturalization, ab initio denaturalization.

Mr. Gold: That is a legal interpretation.

Mr. Williams: In the order signed by Judge Dawson he cited he is not now and never was a citizen. If it is offered for that purpose of course I object. The effect of denaturalization with respect to this deportation case is a legal question for this Examiner to decide and not for Judge Dawson to decide in another case.

Mr. Perlovsky: You see first of all, Exhibit No. 3 shows in itself that the court, or the Judge, in rendering its order stated that the defendant was regarded as never having been naturalized as a citizen of the United States and I think this record is entitled to show that fact and
22 this is why the offering is made in addition to the other opinion of the Judge and also of the affirmation by the Supreme Court of that order. This is what the evidence itself shows. Since it is relevant to this proceeding I believe it should be received in evidence.

Mr. Williams: I understand the purpose of the offering and object to the Exhibits 3, 4, 5 and 6. I would object to their going in, Mr. Examiner.

Mr. Gold: Number 3 has been entered.

Mr. Williams: I didn't consent to its going in. I said it was covered by stipulation. Now Mr. Perlovsky says he

is offering it to show a retroactive effect of denaturalization. I don't think it is admissible to resolve a legal question which will ultimately be resolved by this Examiner and perhaps by the courts at a later time. I don't think the legal question in the frame of reference of a denaturalization case should govern the conduct of these hearings which are deportation hearings. The effect of Judge Dawson's decree must be determined by the Examining Officer and Board of Immigration Appeals and courts in this frame of reference, not in the other case. It is a legal question and I object to the offering of these exhibits.

Mr. Perlovsky: Mr. Gold, I don't think you have to guess to that issue when it has been established as a matter of record that the citizenship was revoked from the beginning and if that is what the court did, I think the record should show it.

Mr. Ungar: Doesn't the naturalization statute provide what the effect is and whether there has been a
23 decision?

Mr. Gold: The statute has been determined judicially. I think these documents are admissible for the facts contained and I am overruling the objection. Entered into evidence, the order of the District Court vacating the order admitting him to citizenship as *Exhibit 3.* The Complaint, *Exhibit 4.* Mr. Williams, as you know, we are not bound by strict rules of evidence in administrative proceedings. In any event, a document may be admitted and maybe worth little or no weight. To continue, *Exhibit 5 is* the decision of Judge Dawson. *Exhibit 6* is the Supreme Court decision. Just a minute, I think I may have entered these in the wrong order. Well, I guess that is right.

Mr. Gold: Mr. Perlovsky.

Q. (Mr. Perlovsky) Mr. Costello, I show you certified copies of a General Declaration of the Pan American Airways, Inc., flight 502, and a Passenger Manifest record showing among other things the entry at Houston, Texas on September 20, 1948 of Frank Costello, 115 Central Park,

New York, N. Y. showing "USA Nat. 2136470, September 10, 1925" arriving from Mexico. (Documents handed to respondent.) A. (Mr. Williams) Mr. Examiner, on these two exhibits I said to you at the outset that we conceded that there had been an entry into Houston, Texas in 1946, 1947 or 1948. It now appears from the documents offered by Mr. Perlovsky that the allegation made in the Order to Show Cause is correct, September 20, 1948. I have no objection to these documents going in but I want to say again it is our position that they have no relevancy
24 to this hearing. The reason I don't object is I understand in the ordinary course of this hearing you prefer to have arguments of law made in brief rather than orally. It is our contention, so that it will not be misleading, that the entry in 1948 is not an entry within the purview of the statute. But, as far as these documents go showing the date, we don't object.

Mr. Gold: These two documents are entered as *Exhibits 7 and 8*, The Passenger Manifest, number 7, and the General Declaration, number 8.

Q. (Mr. Perlovsky) Mr. Costello, earlier today your Counsel, Mr. Williams, mentioned the fact of your having in your Alien Registration Form submitted certain information. Now, were you in fact registered and fingerprinted as an alien here in the United States Penitentiary, Atlanta, Georgia on March 31, 1961? A. (Mr. Williams) I give the same advice Mr. Examiner, not to answer questions at ths hearing at this time. If you want to show me the form we can stipulate it.

Q. I show Mr. Williams the Alien Registration Form, AR-2, in the name of Frank Costello. A. (Mr. Williams) Mr. Examiner, I don't have any objection to this going into the record with the understanding that it was not and is not a concession that this respondent is a citizen of Italy. That of course is a legal question which he has no capability to answer, and with the understanding that the statement appearing next to 4(a) is not a concession

of Italian citizenship, I don't object to this going into the record.

Q. Can we agree Counsel that the respondent did make the statement in the form that he was a citizen at
25 that time, that is, on March 31, 1961? A. (Mr. Williams) No, we cannot because he didn't make that statement Mr. Perlovsky. It does not say that he is a citizen of Italy. The statement is in the disjunctive.

Q. Can we agree he furnished the word, "Italy" in answer to that item? A. (Mr. Williams) We can agree that he furnished the word, "Italy" to be placed beside the printed language which appears at 4(a) on this exhibit, but that it is our position that that is a legal question and there is no concession of the use of the word "Italy" here.

Mr. Perlovsky: All right, Counsel.

Mr. Gold: *Entered as Exhibit No. 9.*

Mr. Williams: So that there is no mystery, Mr. Examiner, about our position, it is our legal position that he is now a citizen of nowhere.

(Ten minute recess)

Q. (Mr. Perlovsky) Mr. Gold, at this time I offer in evidence certified copy of record of conviction and sentence of Frank Costello of the offense described in allegations number 8 and 9, and it is my understanding that Counsel has agreed to stipulate that these records relate to the respondent. A. (Mr. Williams) Yes, our position is, Mr. Examiner, we are not trying to put Mr. Perlovsky to some unnecessary burden of showing facts that we are not quarrelling about. In order to preserve our position we must object to this evidence because we contend it was
26 obtained in violation of defendant's rights as I have previously indicated. But we are conceding that the records do relate to the respondent. I would like to examine them at this point before completing our objections.

Mr. Gold: You are objecting to their introduction in evidence?

Mr. Williams: Yes. The reason we object is we contend that evidence of this conviction is a consequence of illicit activity on the part of law enforcement officers in the area of wire-tapping.

Mr. Gold: Was that raised during the trial?

Mr. Perlovsky: May I say this record makes no such showing and this is an attempt of Counsel to go behind this record.

Mr. Williams: It isn't quite an attempt to go behind the record Mr. Examiner. To answer your question directly, these things were not raised at the trial. They were raised by us when we came into the case in making a motion for a new trial on newly discovered evidence as respects to wire-tapping. The 2nd Circuit Court of Appeals said since it had not been timely raised at the time of trial it is not to be regarded. It is now our opinion that since new action has been taken as a result of this——

Mr. Gold: What new action?

Mr. Williams: Attempt of deportation on the very same evidence.

Mr. Gold: But aren't you in effect attempting a collateral attack on that judgment?

Mr. Ungar: We are making a timely objection to proliferation of that judgment in another area.

Mr. Williams: Insofar as it being used to bring about another consequence to the respondent, now defend-
27 andt, we are objecting. With the previous objections that we have made being understood as standing, Mr. Examiner, we make the concession that the exhibit just offered does relate to the respondent, Costello.

Mr. Gold: The objection is overruled and the document is entered into evidence as *Exhibit No. 10.*

Q. (Mr. Perlovsky) I now offer in evidence, Mr. Gold, an order of the United States Court of Appeals for the 2nd Circuit, affirming the 3rd and 4th counts and not the 2nd count of the record of indictment which has just been received in evidence. I have shown it to Counsel. A. (Mr.

Williams) Our position on this exhibit, Mr. Examiner, is the same as the position which we stated for the record on the previous exhibit. We concede that it relates to the respondent. We object to it for the same reasons we objected to the admission of the previous exhibit.

Mr. Gold: Objection overruled, document entered into evidence as *Exhibit 11.*

Mr. Perlovsky: I now offer in evidence, Mr. Gold, certified copy of indictment, conviction and sentence of Frank Costello on April 8, 1952 for the offense described in allegation number 11 of the Order to Show Cause, and also a certified copy of the Court of Appeals' decision in that case affirming the judgment of convictions on counts 5, 6 and 8 of this proceeding and reversing as to counts 1, 3, 4, 7, 9, 10 and 11. It is my understanding that Counsel will stipulate that these records relate to the respondent.

28 Mr. Williams: Our position on these, Mr. Examiner, is that we object to their admission on the ground that they are evidence, or constitute evidence, which was the result of wire-tapping and the use of wire-tapped evidence by Officers and Agents of the Federal Government. We concede these documents relate to the respondent.

Mr. Perlovsky: The government contends that this record makes no such showing.

Mr. Gold: Objection overruled and documents entered into evidence as *Exhibit No. 12.* That would be the indictment, judgment of conviction and sentence. As *Exhibit No. 13,* the Court of Appeals order. These (indicating) I take it are the docket entries reflecting the specific entries made here?

Mr. Perlovsky: Yes.

Mr. Gold: Mr. Ungar, did you follow that?

Mr. Ungar: Yes.

Mr. Gold: Exhibit 13 is the order of the Court of Appeals reversing in part.

Mr. Perlovsky: Mr. Gold, I now offer in evidence certified copy of mandate of order judging Frank Costello

guilty for the offense described in allegation 13 of the Order to Show Cause. I understand that Counsel is willing to stipulate that this record relates to the respondent.

(Document handed to Mr. Williams).

Mr. Williams: Your Honor, we object to Exhibit No. 14 going into the record because it is our position that this evidence is a result of violations of the respondent's federal constitutional rights, specifically, his 4th, 5th and 6th
29 Amendment rights. However, we are prepared to make a concession which Mr. Perlovsky represented we would make, saying the document does relate to this respondent. We also take the position that this document is irrelevant for the reason that it is not evidence of the conviction of the crime.

Mr. Gold: Objection overruled and document entered as *Exhibit No. 14.*

Mr. Williams: So that the record will be complete on our position, Mr. Examiner, it is our contention that the evidence which has gone into the record with respect to so-called contempt conviction, are further not relevant in this proceeding because they are not evidence of conviction of crimes involving moral turpitude, and my associate calls my attention to the fact that they are Exhibits 12 through 14.

Mr. Gold: Mr. Perlovsky, do you have anything further?

Q. (Mr. Perlovsky) Mr. Costello, Exhibit 14 shows that you were given a sentence of thirty days in the work house. Did you serve any portion or all of that sentence? A. (Mr. Williams) I give the respondent the same advice I have heretofore given to him.

Q. Mr. Costello, when are you scheduled to be released from this institution, United States Penitentiary, Atlanta, Georgia? A. (Mr. Williams) I give the respondent the same advice, Mr. Examiner.

Q. Mr. Costello, when and if you are released from custody, where do you intend to make your home? A. (Mr. Wil-

liams) I give the respondent the same advice I have given heretofore.

30 Mr. Perlovsky: I have no further questions.

Mr. Gold: Mr. Williams, do you wish to offer anything at this time?

Mr. Williams: Has the government rested?

Mr. Gold: Yes.

Mr. Williams: Mr. Examiner, it was our intention to offer evidence in this hearing through a witness with respect to the allegations number 8 and 9. That witness was Joseph Delaney, who is a member of the New York Bar, who was one of Counsel in the cases referred to in allegations 8 and 9. Incidentally, Mr. Examiner, Mr. Delaney died within the past two weeks and we were then compelled to attempt to make other arrangements. The other lawyer was Leo C. Fennelly, who is also a member of the New York Bar. Mr. Fennelly said he was not able to come to Atlanta and he insisted upon a subpoena to testify when we communicated with him after we learned of Mr. Delaney's death. So, it is our request at this time, Mr. Examiner, that the hearing be adjourned until such time as we can take Mr. Fennelly's testimony and that it be adjourned to New York for that purpose.

Mr. Gold: Just what would be the purpose of his testimony?

Mr. Williams: Mr. Fennelly's testimony I believe would be very relevant because since you have admitted into evidence, evidence of the convictions which are set out in allegations 8 and 9, Mr. Fennelly's testimony would go to the question as to whether or not those convictions related to crimes arising from a common scheme. It is the allegation of the government in this matter that these two crimes of which it contends the respondent was convicted, do not arise from a common scheme.

31 Mr. Perlovsky: May I ask for the record what Mr. Fennelly's connection with this trial was?

Mr. Williams: Mr. Fennelly and Mr. Delaney tried the

income tax evasion case which has been referred to in this proceeding. They tried the case for the respondent. We had been relying on Mr. Delaney's testimony for purposes of this hearing. Mr. Delaney was willing to come here for purposes of this hearing, health permitting. Incidentally, his illness worsened rapidly and he died within the last two weeks. We learned of it only when we began our preparation for hearing.

Mr. Perlovsky: Am I correct that Mr. Fennelly gave no testimony in that trial?

Mr. Williams: He was trial counselor.

Mr. Gold: Do you have any other evidence or anything else to offer, Mr. Williams?

Mr. Williams: Mr. Examiner, it may be we will offer another witness on that subject. We have not yet been able to locate him despite diligent efforts, but I am hopeful we can locate him. He is an accountant who testified at this hearing.

Mr. Gold: At the trial?

Mr. Williams: At the trial, yes, sir.

Mr. Gold: Wouldn't it be easier just to offer the transcript of his testimony?

Mr. Williams: I think there was no testimony at the trial, Mr. Examiner, with respect to the precise issue which is germane to this hearing, the question of the commonness of the scheme.

32 Mr. Gold: What would this accountant offer by this testimony at this time?

Mr. Williams: The testimony which we would offer through Mr. Fennelly, and would have through Mr. Delaney, would go to the question as to whether or not the crimes, convictions set out in paragraph 8 and 9, arose out of a common scheme.

Mr. Gold: Now, Mr. Fennelly was an Attorney. He did not testify in the criminal case you said?

Mr. Williams: He prepared the case.

Mr. Gold: Are you offering him as a witness who participated in this scheme in some way?

Mr. Williams: I am offering him as a witness with knowledge of the facts.

Mr. Gold: Who is the accountant?

Mr. Williams: His name, Mr. Examiner, is Alfred Sweeney.

Mr. Gold: Do you know his address?

Mr. Williams: We undertook to locate him when we learned of Mr. Delaney's death. We wouldn't have had need of either of these men if Mr. Delaney hadn't died. We asked Mr. Fennelly to locate him. Mr. Fennelly was not on his own able to locate him. We made efforts on our own to locate him and as yet have not been successful.

Mr. Perlovsky: Did Mr. Sweeney give any testimony at that trial?

Mr. Williams: Yes, sir. Mr. Examiner, if the government concedes that there was with respect to the income tax convictions which they aver, a commonness of scheme, this evidence wouldn't be necessary.

33 Mr. Perlovsky: Of course not, Counselor, the government does not concede that.

Mr. Williams: Or if the Examiner would dismiss the warrant of deportation on the grounds that there has been no evidence offered by the government to show there was not a commonness of scheme, we would not need these witnesses. It had been our intention, Mr. Examiner, to have Mr. Delaney available in Atlanta. He was willing to be here voluntarily at our call, depending upon the course of the evidence.

Mr. Gold: What is the address of Mr. Fennelly? May we have his full name and address?

Mr. Williams: Yes, sir. Leo C. Fennelly, 20 Exchange Place, New York 5, N. Y.

Mr. Gold: The request for subpoena is denied and the request or motion for continuance is denied. Do you have anything else to offer Mr. Williams? A. Mr. Examiner, I want to call your attention to the fact that we have no control over this situation. We have no control over the

fact that the witness we expected to have available here died, and I urgently request you to let us put this evidence in from the only witness in our opinion who can offer evidence germane to the issue.

Mr. Gold: My denial still stands.

Mr. Williams: I would like at this time, Mr. Examiner, for the record, to formally move for a dismissal of these proceedings on the ground that the government has not sustained its burden of proof on either of its theories, on showing convictions within five years after entry,
34 or alternatively, of showing two convictions not arising out of a common scheme involving moral turpitude since the respondent's entry into the United States.

Mr. Gold: The motion to dismiss the charges will be considered and decision reserved.

Mr. Williams: Mr. Examiner, I want to ask you for an opportunity to file briefs in this matter. We feel that there are some important legal questions, some of them are first impression and we would like the opportunity to fully brief these questions and give the Examiner the benefit of our research.

Mr. Gold: All right, today is the 23rd. You may have ten days, that is to June 2, that is Friday.

Mr. Williams: Would you give us until the next Monday?

Mr. Gold: All right, June 5.

Mr. Williams: May, if during that time, this will cause no delay in the proceedings, if we can secure an affidavit from the witnesses which we hoped to call, may we submit those as part of the record?

Mr. Gold: Yes, you may and they will be admitted into the record as the next exhibit. Send them to me at the Old Post Office Building in Washington, Room 303, to my personal attention.

Mr. Perlovsky: Will you accept them subject to the right of the government's cross-examintaion?

Mr. Gold: If they are received I will see that you view them and if you wish to request permission to submit

cross-interrogartories you may do so. Is that agreeable to all concerned.

35 Mr. Williams: One last thing. We would like to offer in the record as respondent's exhibit the summation of the prosecutor in the income tax case about which reference has been made in this hearing and which afforded the basis for allegations 8 and 9 in this hearing. We do not have a certified copy of it. We can supply the Examiner with a certified copy of it within three days and send a copy to Mr. Perlovsky.

Mr. Gold: That relates to the income tax case?

Mr. Williams: Yes, sir.

Mr. Perlovsky: May I inquire the purpose of the offer?

Mr. Williams: To show commonness of the scheme with respect to the two convictions which you aver on the attempted evasion of income tax. We have the summation in the Joint Appendix which went to the Circuit Court of Appeals in the tax case, but we would like to give it to the Examiner in a form which would be less cumbersome because there are about one thousand pages.

Mr. Gold: How many affidavits do you except to send in?

Mr. Williams: No more than two.

Mr. Gold: And you will have those in by May 29, in my office?

Mr. Williams: What is today?

Mr. Gold: Today is May 23rd.

Mr. Williams: If we can we will get everything in by June 5, the affidavits, the summation and the brief, in your hands by June 5. May I ask whether the government would insist on a certified copy of the summation?

Mr. Gold: Perhaps that would save that little time and I think we can take your word for it. After all, it is easy to compare.

36 Mr. Perlovsky: Mr. Gold, could we have a short recess. I have here what appears to be one hundred pages. I would like to become reasonably familiar with it before I can decide.

Mr. Williams: There are only several excerpts.

Mr. Gold: If you want to make an objection make it now.

Mr. Perlovsky: I would like to read this (indicating).

Mr. Gold: How long would it take to read twenty-two pages?

Mr. Perlovsky: There are other things.

Mr. Williams: We are not offering those.

Mr. Gold: We will have a five minute recess.

(Five minute recess)

Mr. Gold: Hearing resumed. Are you entering an objection?

Mr. Perlovsky: May I have a recess Mr. Gold?

Mr. Gold: For how long?

Mr. Perlovsky: Well, Counsel handed me a volume which relates to a very very lengthy proceeding. I think I would need at least an hour to determine the government's position as to——

Mr. Williams: It is twenty-two pages and we have been handling exhibits eight and nine pages all morning.

Mr. Perlovsky: I would like to remind Counsel he is offering a summation of a very very lengthy trial and it occurs to me at this point, wouldn't it be proper for Counsel to offer the whole record rather than the summation?

Mr. Williams: I am offering the prosecutor's statement.

Mr. Perlovsky: Then I would like time to digest it.

Mr. Gold: You may have twenty-two minutes.

(Recessed until 12:22 p.m.)

37 Mr. Perlovsky: I object to the offering Mr. Gold. Counsel is offering a summation of testimony and I believe that the testimony itself is the best evidence and unless Counsel offers the entire record then I object to the offering of the summation as a partial record instead of the record which is the best evidence.

Mr. Gold: Objection overruled. A copy of this summation, when received, will be entered into evidence as the next consecutive exhibit.

Mr. Williams: Mr. Examiner, may I inquire as to whether

or not our request for a subpoena to issue to Mr. Fennelly was denied because it was not in writing, if so, we would like an opportunity to present it in writing. I know the rules do require written motion for subpoena. We are required to submit a written motion. If that is the reason it was denied——

Mr. Gold: That of course would be one of the reasons, since it was not submitted in accordance with the requirements of the regulations.

Mr. Williams: May we submit such a motion at this time in writing?

Mr. Gold: If you wish.

Mr. Williams: I will need about five minutes to prepare it. We had prepared an application, Mr. Examiner for both Fennelly and Sweeney, on the assumption we could contact Sweeney, so I can excise Sweeney.

Mr. Gold: You may do that.

(Recess granted while application for subpoena retyped)

Mr. Williams: May the record show, Mr. Gold, that we have filed an application for subpoena to issue to Leo C. Fennelly, 20 Exchange Place, New York, N. Y. in which we have recited what we expect to prove by his testimony and we have also cited his reluctance to appear without a subpoena. We had hoped to prove, as we stated in our original motion that the income tax violations upon which the government relies were not two crimes not arising from a single scheme of criminal misconduct.

38

Mr. Gold: The request for subpoena is again denied. Do you have anything further, Mr. Perlovsky?

Mr. Perlovsky: I do. Mr. Gold, from the same trial record from which Counsel extracted what is Exhibit 15 of this proceeding, I wish to——

Mr. Gold: I haven't numbered it as a stipulated exhibit yet. We will regard it as *Exhibit 15* when received.

Mr. Perlovsky: I extract and offer in evidence copies of the following: Summation by Mr. Fennelly on behalf of defendant, Mr. Costello. That, Counsel, appears on pages

1787 A to 1809 A inclusive of the volume that you have, entitled, "United States Court of Appeals for the Second Circuit, United States of America against Frank Costello, Volume 3", also, affidavit of Frank Costello in support of motion of Grand Jury, dated February 19, 1954 on page 83 A and 84 A, volume 1. The testimony of Alfred E. Sweeney for defendant Frank Costello, contained in pages 1660 A to 1776 A inclusive, of volume 3, and the 1948 and 1949 income tax returns of respondent Frank Costello, and as to this latter offering, I have certified copies.

Mr. Gold: These you are offering in evidence?

39 Mr. Perlovsky: I am offering now certified copies of 1948 and 1949 tax returns of the respondent and the other three I will send them to you later, sir.

Mr. Gold: These two certified copies of returns for the year 1948 entered into evidence as *Exhibit No. 16*, for the year 1949, *Exhibit 17*.

Mr. Gold: Anything else, Mr. Perlovsky? A. That is all, sir.

Mr. Williams: Mr. Examiner, we object to these exhibits. When we offered our exhibit we offered it as an admission made by an Officer for the Court. However, now we have offered here some testimony from a trial. We object to all of the testimony at the trial going into this record unless it relates to the specific issue in question. In addition to that basis we urge the grounds that we have heretofore urged, that the evidence was obtained as a result of wire-tapping and violation of federal mail statutes and I think Counsel should show us what portion of the witness' testimony relates to this particular issue.

Mr. Perlovsky: Well, earlier Counsel had requested that he be given the opportunity to file an affidavit by Mr. Sweeney in the matter of the common scheme issue, as I understand it.

Mr. Williams: Yes, sir.

Mr. Perlovsky: Here we have Mr. Sweeney giving testimony at this same trial and this offering is made in sup-

port of the government's conviction that no single scheme of criminal misconduct was involved.

Mr. Williams: You mean the whole body of testimony is offered, all of Mr. Sweeney's testimony?

40 Mr. Perlovsky: I don't understand you?

Mr. Williams: Is all of Mr. Sweeney's testimony offered for that purpose?

Mr. Perlovsky: Yes, sir.

Mr. Williams: We object to it going in, Mr. Examiner.

Mr. Gold: His testimony ran for about eighteen pages, is that right?

Mr. Williams: Ran to over a hundred pages, one hundred and six pages.

Mr. Gold: You are offering just eighteen pages, Mr. Perlovsky? A. Yes, sir.

Mr. Ungar: Mr. Sweeney's testimony is over one hundred pages.

Mr. Gold: You are offering the whole thing?

Mr. Perlovsky: Yes, sir.

Mr. Williams: That is not what you said. You said you were offering from page——

Mr. Perlovsky: That is merely the summation.

Mr. Williams: We object to it on the ground that there was no opportunity for cross-examination on the trial for which it is being offered.

Mr. Gold: If the summation is to be offered as new evidence to be considered, then I would say that certainly the testimony upon which it is based should be considered in the case, so that I am overruling the objection. We might as well see it all.

Mr. Perlovsky: Let the record show I wish the opportunity to also file a brief.

41 Mr. Gold: All these documents, including briefs, are to be received by me no later than June 5, 1961.

Mr. Williams: Mr. Perlovsky, will you send us a copy of your brief?

Mr. Gold: I think it would be preferable if you would send them to each other.

Mr. Ungar: All briefs due on the same day?

Mr. Gold: Not later than June 5. I hope you won't all wait until the last day.

Mr. Williams: Have you given numbers to the extracts of the record that Mr. Perlovsky has referred to?

Mr. Gold: Let's give everything a number. The Prosecutor's summation, *Exhibit 15.* Affidavits, whether there will be one, two or three, will be entered as *Exhibit 16*, if more than one, Exhibit 16A, B, and so on. The brief will of course be regarded as part of the papers in the file without being numbered as an exhibit. The summation by Mr. Fennelly, *Exhibit 17*, Affidavit of respondent, *Exhibit 18.* Testimony of Mr. Sweeney, *Exhibit 19.* Brief of the Examining Officer will be included in the official record file.

Mr. Ungar: And the two tax returns?

Mr. Gold: The two tax returns are now renumbered *Exhibit 20* and *Exhibit 21.* The last number is 21. Do you have anything further Mr. Perlovsky? A. No, sir.

Q. Mr. Williams? A. No, sir.

Q. Mr. Costello, this is a question asked of all
42 respondents in deportation hearings. In the event you are deported, to which country do you prefer to go. You have the right to specify the country to which you would prefer to go? A. (Mr. Williams) The respondent, Mr. Examiner, wants to decline most respectfully to name a preference.

HEARING CLOSED

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

June 21, 1962

File: A12 143 440—New York, N. Y.

IN DEPORTATION PROCEEDINGS

In The Matter Of
FRANK COSTELLO (CASTIGLIA)

Respondent

CHARGES:

I & N Act—Section 241(a)(4)—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952).

I & N Act—Section 241(a)(4)—Convicted of crime committed within five years of 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951).

I & N Act—Section 241(a)(4)—Convicted two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957).

APPLICATION: Termination of proceedings

IN BEHALF OF RESPONDENT:
Edward Bennett Williams, Esq.
Harold Ungar, Esq., *of Counsel*
1000 Hill Building
839 17th Street, N. W.
Washington 6, D. C.

IN BEHALF OF SERVICE:
Morris Perlovsky
Examining Officer
5th and Chestnut Sts.
Philadelphia 6, Pa.

According to this record respondent was born in Italy on January 26, 1891; he entered the United States at New York City on April 2, 1895; he departed abroad for a visit and returned to the United States through Houston, Texas, on September 20, 1948; on September 10, 1925, he became a naturalized citizen of the United States; the Federal District Court for the Southern District of New York revoked his citizenship on March 9, 1959 on the ground that it was procured by concealment of a material fact or by wilful misrepresentation; and on February 20, 1961, the Supreme Court of the United States upheld the revocation of United States citizenship on that ground. *Costello* v. *United States,* 365 U.S. 265, 81 S. Ct. 534 (1961).

Counsel for respondent claims that respondent is stateless, and contests the second part of the second allegation of fact in the order to show cause. It is conceded that he is an alien. Whether he is now a national of Italy or of any other foreign country can have no bearing on the three charges of deportability—alienage is the indispensable fact, not present foreign nationality. No finding will be made as to whether he is a citizen of Italy or stateless.

All three charges of deportability are based upon Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204 (1952), 8 U.S.C. 1251(a)(4).[1] The first question to be resolved is whether respondent was convicted of crimes involving moral turpitude.[2]

---

[1] "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—, . . . is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

[2] Although it defies definition, it has been held that the phrase "crime involving moral turpitude" does not render the deportation statute unconstitutional for vagueness. *Jordan* v. *DeGeorge,* 341 U.S. 223 (1951). This

Respondent was convicted on April 8, 1952, in the United States District Court, Southern District of New York, for wilfully refusing to answer questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, in violation of Title 2, Section 192, United States Code, which reads:

> Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months. (R.S. § 102; June 22, 1938, ch. 594, 52 Stat. 942).

He received a prison sentence of one year on one count and six months on each of two other counts. The contention of the Service that this crime involves moral turpitude is laid at rest by the Supreme Court of the United States in *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929):[3]

> There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the

---

wording is deeply rooted in the common law; it has appeared in immigration laws since 1891; and has been applied by judicial interpretation time and again to specific crimes. *Ibid.* The definitions of law dictionaries and some courts which have declared that "moral turpitude" means baseness, vileness, or moral depravity merely offer in substitution for one indefinite expression a multiple choice of three other vague terms. The Congress has never attempted a statutory definition.

[3] Oddly, in its brief the Service cited this case in support of its stand that the crime *does* involve turpitude.

offense is refusal to answer pertinent questions. No moral turpitude is involved.

This conviction of respondent was appealed to the Court of Appeals for the Second Circuit. *United States* v. *Costello*, 198 F.2d 200 (2d Cir. 1952). At page 205 the Court held that this charge to the jury was a correct statement of law:

> To find that the defendant acted wilfully you must find that he did not act in good faith when he left the presence of the Committee, or when he refused to give any testimony. A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith.

In other words, evil intent or purpose is not required for conviction under this statute, and it is for this reason that the crime does not involve turpitude. *Ablett* v. *Brownell*, 240 F.2d 625 (D. C. Cir. 1957).

The Service has cited *Twentieth Century-Fox* v. *Lardner*, 216 F.2d 844 (9th Cir. 1954), Cert. denied, 348 U.S. 944. Lardner was convicted of contempt of a Congressional Committee. His employment contract permitted its termination by the motion picture producer if Lardner were to "commit an offense involving moral turpitude under Federal, state or local laws or ordinances." The Court said at page 852 that the word "offense" in Lardner's contract may be given a little broader meaning than "crime", and could justify dismissal for conduct that was no legal crime at all. The Court went on to say at page 852:

> It would appear that although the crime, per se, is one not historically infamous or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all the circumstances to tell the committee whether he was a Communist should be held

moral turpitude as a matter of law—not on the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C.

The Court at page 851 stressed that "This being a California contract, California decisions would govern." The Court took cognizance of the Sinclair case as "authority for the proposition that moral turpitude is not an essential element of the crime," but then added, "That is not to say that the circumstances of the commission of the crime may not be saturated with moral turpitude." The "circumstances" were contained in "a complete transcript and pictorial record of the performance before Congress."

The issue in the Lardner case was whether he committed an offense involving moral turpitude. A contract of employment was at stake,—not deportation. The term "offense" was construed to be broad enough to include conduct that was not even a crime. The Court recognized that the crime of contempt of Congress was not, per se, morally turpitudinous but permitted inquiry into circumstances aliunde the record of conviction. Such inquiry is forbidden in deportation hearings. This factor clearly distinguishes Lardner from the case at hand. It was aptly put in *United States ex rel. Zaffarano* v. *Corsi*, 63 F.2d 757, 759 (2d Cir. 1933):

> . . . neither the immigration officials nor the court reviewing their decision may go outside the record of conviction to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean the charge (indictment), plea, verdict, and sentence. The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted.

In *United States ex rel. Robinson* v. *Day*, 51 F.2d 1022 (2d Cir. 1931), the Court said at page 1022:

> when by its definition (the crime) does not necessarily involve moral turpitude, the alien cannot be deported

> because in the particular instance his conduct was immoral . . . Conversely, when it does, no evidence is competent that he was in fact blameless.

For deportation purposes, conviction for contempt of Congress is not a crime involving moral turpitude.

Allegation of fact number 13 claims that respondent was convicted on May 7, 1957, in the Court of General Sessions of the County of New York, N. Y., of criminal contempt of court due to refusal to answer questions of the Grand Jury of the County of New York, N. Y. Exhibit number 14 in the record of deportation proceedings shows that Costello was adjudged guilty of criminal contempt of court following a summary proceeding. He was ordered committed to the Workhouse for a term of thirty days. Costello was punished under New York Judiciary Law, Section 750 A (5), Power of courts to punish for criminal contempts.[4] He was not convicted under the New York Penal Law, Section 600(6), Criminal Contempt.[5] "The two proceedings are wholly independent of each other" and the law "contemplates that both remedies, or either may be pursued". *Sherwin* v. *Mead*, 92 N.Y. 415, 420 (1883). The procedure under New York Judiciary Law "is not a criminal prosecution"; and conviction in a criminal action will not bar later punishment by summary proceeding since there is no violation of the constitutional provision that no person shall be subject to be twice put in jeopardy for the same offense. *Hanbury* v. *Benedict*, 146 N.Y.S. 44, 47 (1914).

---

[4] "A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: . . . contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory . . ."

[5] "A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor: . . . Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory . . ."

Myers v. *United States*, 264 U.S. 95, 104-105 (1924) distinguishes between "proceedings for contempt" and "criminal prosecution":

> While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.

The New York Penal Law itself draws this distinction in Section 601 when it states, "A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court." Section 602 states, "Punishment for a contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment for the same offense." At page 103 in the Myers case, supra, the court declares that contempt proceedings "are *sui generis*—neither civil actions nor prosecutions for offenses". Courts having no criminal jurisdiction may nevertheless punish for criminal contempt. *In re Debs*, 158 U.S. 564 (1895); *Bessette* v. *Conkey*, 194 U.S. 324 (1904). The state statutory law and judicial authority leave no doubt that for the purposes of the deportation statute Costello was not *convicted of a crime* when he was adjudged guilty of criminal contempt in a summary proceeding under New York judiciary law.

Exhibits 10 and 11 show that respondent was convicted in the United States District Court for the Southern District of New York on May 17, 1954, for the offense of wilfully and knowingly attempting to defeat and evade federal income tax by filing false and fraudulent income tax returns. Costello was convicted on two counts, the first relating to a tax return filed on or about January 14, 1949, for the calendar year 1948, and the other count relating to a tax return filed on or about March 10, 1950, for the calendar year 1949. This conviction arose under Section

145(b) of Title 26, United States Code.[6] The sentence was five years on each count, to run concurrently, and a fine was imposed. Since fraudulent conduct is an essential ingredient, this crime involves moral turpitude. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *Chu* v. *Cornell*, 247 F.2d 929 (9th Cir. 1957), Cert. denied 355 U.S. 892; *United States* v. *Scharton*, 285 U.S. 518 (1932); *Bloch* v. *United States*, 221 F.2d 786 (9th Cir. 1955); *Khan* v. *Barber*, 253 F.2d 547 (9th Cir. 1958), Cert. denied 357 U.S. 920.

In addition to establishing that respondent was convicted of two crimes involving moral turpitude, the Service must also show that the crimes did not arise "out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial".

Khan v. *Barber, supra,* dealt with a two count indictment charging the defendant with violation of Section 145(b) of Title 26, United States Code for wilfully attempting to defeat and evade federal income taxes for the years 1946 and 1947 by filing two separate false and fraudulent tax returns. The Court of Appeals for the Ninth Circuit said that fraudulent tax returns in two successive years could, or could not, be one plan or scheme; and held that the records of conviction were sufficient to establish that the crimes were unrelated and did not arise out of a single scheme of criminal misconduct, in the absence of facts proving that a single scheme did exist. These are precisely the facts in the case at hand,—we have two counts charging Costello with attempted evasion of federal income taxes for two successive years by filing two separate false re-

[6] Title 26, U.S.C. Section 145(b), 1939 Code, provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully failes to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

turns. The Service has presented the record of these convictions. Costello has not offered his testimony, but has presented the prosecuting attorney's summation on behalf of the Government in the tax case (Exhibit 15). What the prosecutor says at one point is, "If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country will break their backs carrying the load for these easy money Costellos".

The criminal case did not require that the prosecution prove that a single scheme existed, and the use of the word "scheme" in the summation was not a claim that both crimes arose out of a single scheme,—it was undoubtedly intended to mean that Costello's conduct was wilful in that he deliberately schemed or planned each offense. The summation deals basically with Costello's alleged methods of hiding income and assets. The examining officer, acting as the representative of the Service, offered in evidence an affidavit of Costello in support of motion for inspection of the minutes of the Grand Jury which returned the tax indictments (Exhibit 18). In the affidavit Costello asserts that "your deponent filed Federal Income Tax Returns which truly and accurately reflect all of his income for the said years and your deponent paid in full all taxes due thereon". The examining officer also presented the summation of defense counsel (Exhibit 17), and the testimony of a defense witness, Alfred E. Sweeney, a public accountant (Exhibit 19). In my view, Exhibits 15, 17, 18, and 19 do not offer any probative evidence tending to establish that a single scheme of criminal misconduct either (1) did exist or (2) did not exist.

In my opinion, the rule laid down in the Khan case is that the record of conviction of two counts of attempted federal income tax evasion for two successive years, by filing two separate false returns, suffices to establish that respondent's crimes were unrelated and did not arise out

of a single scheme, in the absence of probative evidence that a single scheme did exist.

Counsel for respondent has cited *Wood* v. *Hoy*, 266 F.2d 825 (9th Cir. 1959); *Zito* v. *Moutal*, 174 F.Supp. 531 (N.D. Ill. 1959); *Jeronimo* v. *Murff*, 157 F.Supp. 808 (S.D. N.Y. 1957). These three cases are distinguishable from the Khan case. Wood testified that he and another person had entered into an agreement about two or three weeks beforehand to rob (1) a certain liquor store and (2) a certain theatre; and they carried out this scheme, which resulted in Wood's convictions. The Service offered no evidence other than the records of conviction. In *Zito*, the Government merely introduced the record of conviction; the indictment charged a continuing conspiracy to commit offenses of the same type; in each case the victim was the same; the same defendants participated in the offenses; and the offenses allegedly occurred approximately nine days apart. Jeronimo was convicted of (1) conspiracy to commit bribery and larceny; (2) bribery; and (3) larceny. The Service rested upon the records of conviction. The Court held that all of the acts and transactions alleged in the single indictment were connected together and that all of such acts and transactions were in furtherance of the same conspiracy and constituted part of a common scheme and plan.

In other words, Wood's testimony that he had entered into a single scheme to commit the two robberies overcame the record of conviction which, standing alone, could have carried the burden of establishing that there was no single scheme. In *Zito* and *Jeronimo*, the record of conviction, *per se*, did not suffice to show that the offenses were so unrelated that they did not arise out of a single scheme,—in fact, the indictment in *Jeronimo* clearly alleged a single scheme; and in *Zito* the Court said that the charges in the indictment gave equal support to a finding either way, which meant that the Government had failed to carry its onus.

Another case cited by counsel is *Miceli* v. *Landon*, 238 F.2d 864 (1st Cir. 1956). Here the Court upheld the finding that a single scheme did not exist. The entire record of the deportation hearing was not available to the Court. The opinion discusses the crimes involved, and concludes that the evidence of record "might well have been adequate to sustain the finding that the two offenses of which Miceli was convicted did not arise 'out of a single scheme of criminal misconduct' ". While we do not know what the Service presented at the deportation hearing of Miceli, the Court based its opinion on the conviction record, and we do know that in the *Kahn, Wood, Zito,* and *Jeronimo* cases the Service relied solely upon the records of conviction. In the instant case, the Service is also resting on the conviction record. Thus it becomes apparent that the same principles of law are applied in *Wood, Zito, Miceli, Khan,* and *Jeronimo*. In each instance, the burden of proof is regarded as resting upon the Service. In each case, the discussion makes it plain that such burden can be carried by the record of conviction *per se;* and certainly this is reasonable, for the Service is required to prove not only a negative, but probably, in most instances, a *negative state of mind* of one person,—the respondent—during an indefinite period of time prior to the first of at least two crimes. Such a ponderous burden would have rendered the deportation statute well-nigh meaningless unless the Courts had adopted this rule. On the basis of the judicial decisions (and the facts in this regard are identical to *Khan*), it is found that the record of convictions suffices to establish that the two tax crimes did not arise out of a single scheme of criminal misconduct.

It is appropriate to take note of Costello's failure to offer his testimony on the issue of single scheme. Counsel for respondent requested the issuance of a subpoena for one Fennelly, an attorney who represented Costello at his tax trial. Counsel asserted that this person could offer evidence pertinent to the single scheme issue. Counsel

admitted that the witness did not participate in the crimes but asserted that he had "knowledge of the facts". Here we are presented with a situation where counsel has the best witness on this planet seated next to him,—the respondent—yet he seeks a subpoena for someone else, a person not involved in the crimes, to speak on the question as to whether the crimes arose out of a single scheme of criminal misconduct. The request for subpoena was denied; later, counsel asked leave to submit affidavits from this person and another; this request was granted; but no affidavits were submitted. It is permissible to draw an adverse inference from this silence of Costello who, after all, is peculiarly in possession of information as to whether or not his crimes arose out of a single scheme. Being in possession of the facts and yet failing to come forward, the silence of respondent may be regarded as evidence of the most persuasive character. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923). However, I deem this inference unnecessary because it is my finding that the conviction record, in and of itself, establishes that the crimes did not arise out of a single scheme of criminal misconduct. *Khaw* v. *Barber, supra.* This finding is totally independent of any inference which can be drawn from Costello's silence.

The second charge of deportability is keyed to respondent's 1948 return to the United States, charging him with convictions for crimes committed within five years after entry on September 20, 1948, for which there was a sentence to confinement for a year or more. The three crimes are the two tax violations and the contempt of Congress. Counsel for respondent contends that since Costello was holding a certificate of naturalization at the time of his return to this country in 1948 he cannot be regarded as having then effected an "entry". *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (6th Cir. 1956) is directly in point. Brancato first entered the United States in 1914; he was naturalized in 1929; then left the United

States and reentered in 1930; was convicted of a crime involving moral turpitude in 1932; and was denaturalized in 1939. The question was whether he was deportable for conviction of a crime committed within five years after the 1930 return. The Court held that since Brancato did not come into the United States as an alien, he did not make an "entry" in 1930. The decision recognized that the judgment of denaturalization nullified the order of naturalization *ab initio*, but the Court refused to treat Brancato as if he were an alien in 1930 when factually he was a citizen with a legally issued United States passport.

The term "entry" did not have a statutory definition until the Immigration and Nationality Act of 1952. Section 101(a)(13) of that Act, 8 U.S.C. 1101(a) limits "entry" to "any coming of an alien into the United States". Under the second part of Section 241(a)(4), it is necessary to establish that respondent is now an alien; that he was in actuality an alien at the time of an entry preceding the convictions, *Brancato* v. *Lehmann, supra;* but it is not necessary to show that he was an alien at the time of his convictions, *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521 (1950); *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524 (9th Cir. 1956). Any entry, whether it is the first coming or a subsequent one, may be used as the basis of deportability. *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422 (1933). Since the 1948 return is not deemed an entry, this record establishes only one entry into the United States, on April 2, 1895. In *Eichenlaub*, the Supreme Court ruled that the pertinent section of law did not specify a requirement of alien status when convicted; and stated that it was not necessary to give a retroactive effect to the denaturalization.

Costello was denaturalized under Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, as amended 68 Stat. 1232; 8 U.S.C. 1451, which gives retroactive effect

to his denaturalization, stating that "such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate". In *Eichenlaub*, the Court opined at page 532 that the law did not intend to preclude the Government from deporting alien offenders merely because they were convicted at times when they held certificates of naturalization later canceled for fraud. The highest tribunal then asserted that a contrary interpretation "would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it". It is my conclusion that the retroactive effect of Costello's denaturalization, specified in the statute, confers upon him an alien status at all times and for all purposes, except where the language of the Congress is deemed to have spoken otherwise. *Brancato* has held that the Congressional definition of "entry" requires coexistence of actual alienage and coming into the United States; under the holding in *Mangaoang* v. *Boyd*, 205 F.2d 553 (9th Cir. 1953), Cert. denied 346 U.S. 876, the language of the legislators demands coexistence of alienage and subversive conduct for deportability under Section 241(a)(6) of the Immigration and Nationality Act, formerly Section 4(a) of the Act of October 16, 1918, 8 U.S.C. 137, as amended by Section 22 of the Subversive Activities Control Act of 1950. These are the only exceptions. *Mangaoang* did not involve denaturalization; it concerned a Filipino who came to the United States in 1926 at a time when he was a national; he was a member of the Communist Party from 1938 to 1939; the Philippine Independence Act of July 4, 1946, rendered him an alien on that date. The Court held that he was not deportable under the Internal Security Act of 1950 because (1) he did not effect an entry in 1926 because he was not then an alien and (2) he was not simultaneously an alien and a member of the Communist Party.

Counsel hints that *Eichenlaub* might not be followed if the same case came before the Supreme Court now. That is pure conjecture. On the other hand, we do not know if the *Brancato* decision would be accepted by the Supreme Court.

Counsel has pointed to *Rosenberg* v. *United States*, 60 F.2d 475 (3rd Cir. 1932); Cert. denied 287 U.S. 645, as authority for the proposition that the "relation back" theory (deeming a denaturalized person as having been an alien *ab initio*) should be applied only where the naturalizing court lacked jurisdiction to naturalize the subject. Rosenberg did not meet the residence requirement which was necessary to confer jurisdiction on the court. Although *Rosenberg* happened to involve lack of jurisdiction for residence, this is not the *sine* qua *non* for application of the relation back theory. In fact, Rosenberg was denaturalized not only on the jurisdictional ground but also for fraud. Counsel feels that *Rosenberg* is the leading authority for the "notion that illegally procured citizenship may be disregarded nunc pro tunc", as he remarks in his brief at page 8. That point was not in issue in that case, nor in *Johannessen* v. *United States*, 225 U.S. 227 (1912; nor *United States* v. *Spohrer*, 175 F. 440 (C.C.D., N.J. 1910), also cited by counsel. Costello's denaturalization, pursuant to Section 340(a) of the Immigration and Nationality Act, carries with it the statutory declaration that it is retroactive.

Counsel has mentioned that *United States* v. *Stephan*, 50 F. Supp. 445 (E.D. Mich. 1943) demonstrates that "an illegal naturalization is not a nullity for all purposes". Stephan obtained citizenship in 1965 by fraud; he was found guilty of treason in 1942. He argued that since his naturalization was subject to revocation for fraud, upon a proceeding instituted by the Government, he should be deemed an alien retroactively and therefore incapable of having committed treason. The naturalization had not been revoked. The Court declared at page 448:

> It is self-evident that fraud in procuring the order of naturalization, although a ground for its cancellation, does not render it void but only voidable; and that until such time as his citizenship is revoked, such fraud does not lessen his obligations and duties to this country or relieve him of the solemn undertakings he made in his oath of allegiance.

All this case holds is that unless and until the individual is denaturalized by a court, he is still recognized as a citizen for all purposes. The Government had its choice of prosecuting for treason or bringing an action to denaturalize. It chose the former. Stephan was not in a position to declare himself denaturalized for fraud,—only a competent court could do so.

Counsel's citation of *Cepo* v. *Brownell*, 147 F. Supp. 517 (N.D. Cal. 1957) turns upon a denaturalization under Section 15 of the Act of June 29, 1906, 34 Stat. 601, U.S.C. 405 (1934 Ed.). This law did not specify that denaturalization was to be given a retroactive effect,—Section 340(a) of the 1952 Act under which Costello's citizenship was set aside does specify such effect. In addition, *Cepo* is outweighed by authority to the contrary cited in *In re Naturalization of Estevez*, 189 F. Supp. 705, 709 (E.D. Pa. 1960). Further, *Cepo* deals not with the denaturalized person but with those claiming derived or acquired citizenship flowing from the denaturalized person. Section 340 of the 1952 Act now spells out the status of claimants of such rights when the principal is denaturalized.

In this connection, counsel for respondent has cited *Gubbels* v. *Hoy*, 261 F.2d 952 (9th Cir. 1958). Gubbels was convicted by a court-martial in Germany while serving with the American armed forces. The Court ruled against deportability under Section 241(a)(4) of the Immigration and Nationality Act because of the qualifying provisions of Section 241(b). The latter section wipes out the applicability of Section 241(a)(4) where (1) there has been a pardon of the pertinent crimes by the President

or a Governor or (2) the court sentencing the alien makes, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation against deportation. *Gubbels* turned on the narrow point as to whether a court-martial should be regarded as a "court" within the contemplation of Congress in enacting Section 241(a)(4). This decision held that a court-martial could not have been contemplated, when considering Section 241(a)(4) in conjunction with Section 241(b), since (b)(2) could be a practical impossibility in such cases because of time lag; all of the Constitutional guarantees may not be invoked in "cases arising in the land or naval forces"; and Section 241(b) speaks of "prosecution authorities", hardly an apt description of the military authorities. In sum, the tribunal felt that the individual convicted by court-martial was deprived of an important right or privilege which the Congress had intended to be available for all who came within Section 241(a)(4). *Gubbels* is an isolated case and turns on a narrow, specific point. I see no reason to extend its impact to the instant case. Costello was prosecuted and convicted in a civilian, not a military, court. He had the benefit of all of the Constitutional guarantees. He was convicted in the United States, not abroad. And he is still protected by Section 241(b)(1) of the Immigration and Nationality Act which can eradicate his deportable status upon his receipt of a pardon as described in that section. Gubbels was unable to take advantage of Section 241(b)(2) because of a situation not of his own doing, whereas Costello's inability to derive the benefits of a recommendation against deportation was the creature of his own fraud.

During the deportation hearing counsel for respondent protested the fact that the Government sought to deport Costello on the basis of criminal convictions which he claimed were obtained in violation of respondent's legal and Constitutional rights. He specified that the evidence leading to the convictions resulted from wire tapping and

from violation of the federal mail statutes. I cannot yield to counsel, for it is a long established principle that where a court had jurisdiction of the person and the subject matter, its judgment of conviction is impregnable to collateral attack. *Bowen* v. *Johnston*, 306 U.S. 19 (1939); *Bowles* v. *Laws*, 45 F.2d 669 (D.C. Cir. 1930), Cert. denied 283 U.S. 841; *In re Tinkoff*, 95 F.2d 651 (7th Cir. 1938), Cert. denied 304 U.S. 573; *Cocke, for the use of the Commercial Bank of Columbus, Mississippi* v. *Halsey*, 41 U.S. 70 (1842).

To sum up, it has here been found that Costello did not effect an entry in 1948. Thus, the second charge of deportability falls. The first and third charges of deportability are the same except that the third contains the additional item of contempt of court. It has been determined above that respondent's being adjudged guilty of contempt of court in a summary proceeding under the New York Judiciary Law did not constitute *conviction of a crime.* Since this would have the effect of reducing the third charge to the same language as in the first charge, the third charge will be dismissed. This leaves the first, which is based upon the two tax convictions and the contempt of Congress conviction. Since it was here found that the contempt offense did not involve moral turpitude, we are left with the two tax crimes. Determination has here been made that the two tax convictions involved crimes involving moral turpitude; that they did not arise out of a single scheme of criminal misconduct; and that Section 241(a)(4) of the Immigration and Nationality Act requires deportation where the convictions occurred during a period when Costello held a certificate of naturalization which he had obtained by fraud, and which was later revoked retroactively. I conclude that on the basis of this record respondent is deportable on the first charge, based solely on the two tax convictions.

It is noted that respondent has a United States citizen wife, that he has resided in this country since 1895, and that he is 70 years old. In order to qualify for any relief

from deportation he must show good moral character for at least the past ten years. Suspension of deportation pursuant to Section 244(a)(5) of the 1952 Act, 8 U.S.C. 1254(a)(5), as well as voluntary departure under Section 244(e), 8 U.S.C. 1254(a)(e) [which must be read in conjunction with Section 244(a)(5)] imposes this requirement. Respondent is unable to show good moral character during the requisite period because of his tax convictions. He is also statutorily barred from any relief from deportation by Section 101(f)(7) of the Act, 8 U.S.C. 1101(f)(7), because he has been confined, due to convictions, to a penal institution for an aggregate of at least 180 days. These deportation proceedings were held at the United States Penitentiary, Atlanta, Georgia, on May 23, 1961, while respondent was still serving his five-year sentence on the tax convictions. He is also ineligible for relief because he has not "been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or assumption of a status, constituting a ground for deportation", as required by Section 244(a)(5). Respondent's deportability arose when he was convicted of the tax violations in 1954.

The only application for relief from deportation made during the deportation hearing was counsel's motion that these proceedings be dismissed or terminated for failure of the Government to establish deportability. The Government has demonstrated deportability on the first charge by reasonable, substantial, and probative evidence, as required by Section 242(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1252(b)(4), and the motion of respondent is denied and an order of deportation will be entered. Respondent was given the opportunity to specify the country to which he would prefer to go if deported, and he declined to do so.

Upon the basis of this record, the following are my findings of fact:

1. The first allegation of fact in the order to show cause is adopted as my first finding of fact;

2. You are a native of Italy;

3. The third allegation is adopted as my third finding of fact;

4. You returned to the United States at Houston, Texas, on September 20, 1948;

As to (5), (6), (7), (8), (9), (10), (11), (12), these allegations of fact are adopted as my findings of fact;

13. You were adjudged guilty of criminal contempt of court in a summary proceeding on May 7, 1957, at the Court of General Sessions of the County of New York, N. Y., pursuant to New York Judiciary Law, for which you were ordered committed to the Workhouse for thirty days;

14. The crimes named in (8) and (9) involve moral turpitude;

15. The crimes named in (8) and (9) did not arise out of a single scheme of criminal misconduct;

16. The crime named in (11) does not involve moral turpitude;

17. The facts stated in finding (13) do not constitute a conviction of a crime.

Upon the basis of these findings of fact, these are my conclusions of law:

(1) That you are deportable from the United States under Section 241(a)(4) of the Immigration and Nationality Act, in that after entry you have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: (1) wilfully and knowingly attempting to defeat and evade income tax due the United States Government for the year 1948 by filing a false and fraudulent income tax return on or about

January 14, 1949, and (2) wilfully and knowingly attempting to defeat and evade income tax due the United States Government for the year 1949 by filing a false and fraudulent income tax return on or about March 10, 1950, both in violation of section 145(b) of Title 26, United States Code.

(2) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act in that you have been convicted of crime committed within five years of your 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951).

(3) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act based on conviction for two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957).

ORDER: IT IS ORDERED that respondent's motion to terminate these proceedings be, and the same is hereby, denied.

IT IS FURTHER ORDERED that respondent be deported from the United States in the manner provided by law on the first charge of deportability based solely on the income tax convictions.

ABRAHAM GOLD
Abraham Gold
Special Inquiry Officer

Notice of Appeal to the Board of Immigration Appeals
Department of Justice, Washington, D. C.

Submit in Triplicate to: IMMIGRATION AND NATURALIZATION SERVICE
20 West Broadway
New York 7, New York

File No.: A-12 143 440

(Special Inquiry Unit)

Date:

In the Matter of
FRANK COSTELLO

I hereby appeal from the decision in the above entitled case dated June 21, 1961.

If this is a DEPORTATION PROCEEDING, you must observe the requirements of the reverse of this form or your appeal may be rejected. Note the limitation on appeals from denial of voluntary departure.

I am not filing herewith written brief or other statement for consideration by the Board of Immigration Appeals. (A supporting brief is not required, but if filed is to be submitted in triplicate to the same office where this notice of appeal is filed.) I shall file a brief prior to the oral argument.

I do desire oral argument before the Board of Immigration Appeals in Washington, D. C.

NOTE:—Oral argument in any one case should not extend beyond fifteen (15) minutes, unless arrangements are made in advance of the hearing for additional time.

An appellant will not be released from detention or permitted to enter the United States to present oral argument to the Board but may make arrangements to have someone represent him before the Board. Unless such arrangements are made at

the time the appeal is taken, the Board of Immigration Appeals will not calendar the case for argument.

HAROLD UNGAR
Counsel for Frank Costello
1000 Hill Building
Washington 6, D. C.

FEE.—Be sure to enclose the required fee, specified in attached letter. Attach money order or check. Do Not send cash. Remittances should be made payable to the "Immigration and Naturalization Service, Department of Justice." If this form is filed in Guam, make remittance payable to "Treasurer, Guam"; if filed in the Virgin Islands, make remittance payable to "Commissioner of Finance of the Virgin Islands." The fee is required for filing the appeal and is not returnable regardless of the action taken thereon.

THIS SIDE MUST BE EXECUTED IN ALL APPEALS IN DEPORTATION PROCEEDINGS

NOTE:—No appeal may be taken in a deportation proceeding from that part of a decision of a Special Inquiry Officer denying voluntary departure *as a matter of discretion* where the alien was in the United States less than 5 years at the time of service of the order to show cause and the Special Inquiry Officer has found the alien otherwise eligible for such relief. 8 C.F.R. 242.21(a).)

DEPORTABILITY

Is deportability contested? yes.

If deportability is contested, specify by number findings of fact and conclusions of law to which exception is taken, and state briefly the reasons supporting your contentions.

FINDINGS OF FACT 14 AND 15—CONCLUSIONS OF LAW 1

The above designated Findings of Fact are excepted to on the ground that they are not supported by reasonable, substantial and probative evidence. The above designated Conclusion of Law is excepted to on the ground that it is unsupported by any valid and sufficient findings. The said conclusion is further excepted to on the ground that the Special Inquiry Officer abused his discretion under 8 C.F.R. § 287.4(a) in denying the alien's application for subpoena and thereby depriving the alien of his opportunity of adducing evidence that he was not convicted of two crimes not arising out of a single scheme of criminal misconduct.

DISCRETIONARY RELIEF

If appeal is based (in whole or in part) on the denial of an application for discretionary relief, indicate briefly the specific relief requested; and state briefly the reasons supporting your request.

. . . . . .

Decision and Order of Board of Immigration Appeals

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

January 2, 1962

File: A-12143440—New York

In re: FRANK COSTELLO (CASTIGLIA)

IN DEPORTATION PROCEEDINGS APPEAL

ORAL ARGUMENT: October 2, 1961

On behalf of respondent: Edward Bennett Williams, Esq., 1000 Hill Building, 839 - 17th Street, N. W., Washington 6, D. C.

Also present: Harold Ungar, Esq., 1000 Hill Building, 839 - 17th Street, N. W., Washington 6, D. C.

(Alien also present)

On behalf of I&N Service: Irving A. Appleman, Esq.

CHARGES:

Order: Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))— Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952)

Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))— Convicted of crime committed within five years of 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951)

Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))— Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957)

Lodged: None

APPLICATION: Termination of proceedings

This is an appeal from the order of the special inquiry officer requiring the respondent's deportation on the first charge set forth above on the basis of the convictions in 1954 for tax evasion. The appeal will be dismissed.

The respondent, a 70-year-old married male, a native of Italy, concedes that he is an alien. These events are relevant. The respondent entered as an alien in 1895. He was naturalized in 1925. He returned from Mexico to the United States in 1948. He has the following convictions: contempt of Congress in 1952, tax evasion in 1954 (two counts), and contempt of court in 1957. His naturalization was revoked in 1959.

Deportation on the first charge is sought under that portion of Section 241(a)(4) of the Immigration and Nationality Act (8 USC 1251(a)(4) which provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Deportation was ordered on the basis of the tax convictions. The issues are whether these convictions, to constitute grounds for deportation, had to occur while the respondent was an alien, whether the convictions were for crimes involving moral turpitude, and whether they arose out of a single scheme.

THE TAX CONVICTIONS AND ALIENAGE.

This discussion is concerned with one who is an alien but who in the past was a citizen and while a citizen was convicted of crime.

We believe that the precedents hold that if the condition which is basis for deportation (e.g., conviction of crimes) is one which could occur to either an alien or a citizen, then the nationality status of the individual at the time the condition arose is immaterial. We believe that the basis for deportation here is a condition which could have occurred to either an alien or a citizen. We conclude that the nationality status of the respondent at that time was immaterial. The precedents fall into two categories. In the first are the cases decided on the basis of the fact that the ground of deportation is related to the making of an entry and that by definition only an alien can make an entry; therefore, a person who was not an alien at the time he came to the United States, had not made an entry and there was no need to consider whether he had to be an alien later

when the deportable ground arose. If, however, the individual was an alien at the time of entry or if alienage at the time of entry is not a factor because the ground of deportation is not related to an entry, the issue as to the necessity of the coexistence of alienage and the occurrence of the ground of deportation requires decision, but no defined term dictates the answer.[1]

In the situation before us, alienage at the time of entry in 1895 is conceded.[2] The situation before us is one concerned not with alienage and entry but with the coexistence of alienage and the emergence of the ground of deportation. Before we consider this group of cases we shall consider the group which concerned entry since counsel relies upon such cases. The cases concerned with alienage at the time of entry are *Barber* v. *Gonzales*, 347 U.S. 637 (1954) and *U. S. ex rel. Brancato* v. *Lehmann*, 239 F.2d 663, C.A. 6 (1956). Gonzales, a native of the Philippines, was a national of the United States from the time of his birth until 1946 when he became an alien. He resided in the United States continuously from his admission in 1930. Convicted of crimes in 1941 and in 1950, he was ordered deported in 1951 under that portion of Section 19(a) of the Immigration Act of 1917 (39 Stat. 889, as amended, formerly 8 USC 155(a)) which called for the deportation of an alien "who is hereafter [May 1, 1917] sentenced more than once * * * because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." An entry can be made only by an alien who has voluntarily come from a foreign port. Gonzales contended that he had made no entry for he had come neither as an alien nor

[1] In addition to grounds of deportation where alienage is required because an entry is involved is the ground which by its nature can be met only by one who is an alien (*e.g.*, failure to register as an alien, failure to maintain status as nonimmigrant (Sections 241(a)(5) and (9) of the Act, 8 USC 1251)), but we are not concerned with such a ground.

[2] It is proper to use the first entry. (*Banez* v. *Boyd*, 236 F. 2d 934, C.A. 9 (1956); *U. S. ex rel. Beltrage* v. *Kenton*, 131 F. Supp. 576, aff'd 224 F. 2d 803, C.A. 2 (1955)).

from a foreign port; he had come as a national from an insular possession to the mainland. The Service contended that he should be considered as if he had been an alien coming from a foreign port because from 1934 to 1946, the law provided that for the purpose of the immigration laws, Filipinos were "considered as if they were aliens." The court ruled that Gonzales was not deportable. The Court held that until 1934 the Philippines could not be regarded as foreign, that Gonzales had not arrived from foreign, and that there was, therefore, no entry. The Court would not consider Gonzales as if he had made an entry as an alien. This disposition of the case made it unnecessary for the Cour to rule on the contention that Gonzales had not been an alien in 1941 at the time of conviction.

Brancato concerned a native of Italy who had entered the United States as an alien in 1914. Naturalized in 1929, he had returned from a foreign visit in 1930 and had been convicted of a crime in 1932. He was denaturalized in 1939. Deportation was ordered under that portion of Section 19(a) of the Immigration Act of February 5, 1917, as amended (39 Stat. 889, as amended, formerly 8 USC 155(a)) which required the deportation of an alien "who is hereafter [May 1, 1917] sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States." The district court found that Brancato had been properly ordered deported. The district court held that the denaturalization was retroactive making Brancato an alien at the time of conviction. As an additional authority, the court cited *U. S. ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521 (1950) (discussed in detail later). Upon appeal, the circuit court (one judge dissenting) reversed the district court on the ground that the law required an entry and since an entry could be made only by an alien, the law did not apply to Brancato who had entered as a citizen. Despite the denaturalization, the circuit court refused to

indulge in the fiction that Brancato had been an alien at the time of entry. It went on to state that Eichenlaub was not applicable to the "general deportation statute" (Immigration Act of February 5, 1917) which the court was considering.

Passing from the cases which turn on the connection between "entry" and alienage, we come to those concerned with whether alienage must have existed when the deportable ground arose. *U. S. ex rel. Eichenlaub* v. *Shaughnessy* (and *U. S. ex rel. Willumeit* v. *Shaughnessy*), 338 U.S. 521 (1950) (4-to-3 decision) concerned two aliens found to be undesirable residents of the United States whose deportation had been ordered under the Act of May 10, 1920 which in pertinent part provided:

> That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall [if found undesirable residents] * * * be * * * deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917:
>
> > All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate * * * [The Espionage Act of June 15, 1917, as amended].

Eichenlaub, a native of Germany, became a citizen of the United States in 1936. In 1941, he was convicted for violation of the Espionage Act of 1917. In 1944, his citizenship was cancelled on the ground of fraud in its procurement. Willumeit was naturalized in 1931. In 1942, he was convicted of conspiracy to violate the Espionage Act of 1917. In 1914, his naturalization was cancelled on the ground of fraud in its procurement.

The Court found the substantial issue was whether the law required the individuals involved to have been aliens at the time they were convicted. Refusing to decide whether a retroactive effect should be given to the denaturalization orders, the Court stated:

> A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offenses are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied.
>
> * * *
>
> The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but would prohibit the Attorney General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favor of any aliens because they were at one time naturalized citizens, the logical time at which that status would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute.

The Court pointed out the failure of Congress to make a distinction between aliens who had never been naturalized and those who had lost United States citizenship was not the result of unfamiliarity with such matters.

The dissenting opinion stated that the statute permitting the deportation of an alien should be read to apply only to the person who had been an alien when convicted. It

pointed out that since the statute permitted either of the two constructions without violence to language, the construction which led to hardship should be rejected. Its review of the Congressional history failed to reveal that Congress had denaturalized citizens in mind when the law was passed.

Mangaoang v. *Boyd*, 205 F. 2d 553, C.A. 9 (1953), cert. den. 346 U.S. 876, concerned a native of the Philippines who resided continuously in the United States from his admission in 1926. He was a national of the United States from birth until 1946 when he became an alien. He had been a member of the Communist Party from 1938 to 1939. The membership was the basis for an order of deportation under the Act of October 16, 1918, as amended by the Internal Security Act of 1950 (64 Stat. 1006, c. 1024, Title I, Section 22) providing in pertinent part for the deportation of—

> "Any alien who was at the time of entering the United States or has been at any time thereafter" a member of the following class:
>
> Aliens who are members of * * * the Communist Party of the United States (8 USC 137(2), 137-3(a), Supp. V 1946 ed.)

Mangaoang, who had been a national of the United States in 1938 and 1939 when he belonged to the Party, contended that the law called for the deportation only of one who was an alien and a member of the Party simultaneously. The district court ruled that membership and alienage did not have to be coexistent. *Eichenlaub* was relied upon. The circuit court, reversing, ruled that the words "aliens who *are* members" (emphasis in original) indicated that Congress referred to persons who were at the same time both aliens and members of the Party. The court distinguished *Eichenlaub* on the ground that language there calling for the deportation of certain aliens convicted "since August 1, 1914" limited deportation only in that the conviction had

to be after the date given; there was no requirement that alienage must have existed at the time of conviction.

The Government had also contended that if the law called for alienage and membership to exist simultaneously, Mangaoang was deportable, nevertheless, because he had to be considered as if he were an alien since the Philippine Independence Act of 1934 provided that for the purpose of all immigration laws, Philippine nationals "shall be considered as if they were aliens." The circuit court held that there was doubt as to whether Filipinos were to be considered as aliens under all immigration laws or only under immigration laws which existed up to the time the provision went into effect but that if the directive applied to legislation which became effective subsequently, there was nothing in the law under which Mangaoang's deportation was sought which authorized the deportation of nationals who were to be considered aliens. Moreover, if a construction was possible which required deportation of nationals who were to be considered aliens, it would raise an ambiguity which must be resolved in favor of the alien. In deciding this issue, the court also placed reliance upon the fact that the directive had become obsolete in 1946 and no longer had any effective reference to any one. Finally, as a further reason why Mangaoang was not deportable, the court pointed out that deportation was authorized only of an alien who had made an entry into the United States and that when Mangaoang came to the United States in 1926, he had not made an entry.

Resurreccion-Talavera v. *Barber*, 231 F. 2d 524, C.A. 9 (1956) involved a person born in the Philippines. He was a national of the United States from birth to 1946 when he became an alien. He entered the United States in 1934. In 1942, he was convicted of crime. In 1952, he made several visits to Mexico. He was ordered deported under Section 19 of the Immigration Act of 1917 for having been convicted of crime prior to his entry. The pertinent law provided that "any alien who was convicted • • • prior to

entry, of a felony or other crime or misdemeanor involving moral turpitude; shall * * * be * * * deported." Talavera argued that this law did not apply to him because he had been a national at the time of conviction. The court sustained the order of deportation. The court stated "that Talavera was a national of the United States and not an alien at the time of his conviction of the crime involving moral turpitude is irrelevant. * * * The statute under which Talavera was ordered deported does not include a requirement that the deportee be an alien at the time of his conviction." (p. 525)

Counsel is of the belief that the result in *Mangaoang* was different from that in *Eichenlaub* or *Talavera* because *Mangaoang* used the present tense in calling for deportation while in the other cases (counsel alleges), deportation was called for in the past tense. It follows, therefore, counsel contends that since in the instant case deportation is called for in the present tense, the result should be that found in *Mangaoang,* i.e., a coexistence of alienage and the coming into being of the ground of deportation.

We do not believe that counsel's contention can be sustained. In the first place, the language in *Eichenlaub* is not confined to the past tense; it calls for the deportation of aliens who "have been or may hereafter be convicted." Moreover, there is nothing in *Talavera* or *Eichenlaub* to indicate that the tense affected the courts' decision. The Courts found alienage was not a necessity simply because the language did not call for alienage at the time of conviction—either an alien or a citizen could come within the language used. In *Mangaoang,* on the other hand, only an alien could comply with the language the court found controlling. That tense alone is not sufficient where the language does not eliminate all but aliens may be seen from the fact that Congress used the *past* tense in requiring the deportation of individuals for acts which could have been committed *only at a time when they were aliens,* for example, entry without inspection (Section 241 (a)(2), 8 USC 1251)

or failure to register as an alien (the first ground set forth in Section 241(a)(5) of the Act, 8 USC 1251). Surely something stronger than tense of a verb would have been used by Congress had there been the intent to exempt the convicted person who had been a naturalized citizen when the ground of deportability arose, but later became an alien.

That Congress would have resorted to definite language requiring coexistence of alienage and the creation of a ground of deportation is strengthened by an examination of the history of the law. In 1950, the Supreme Court, considering *Eichenlaub*, found that Congress, in enacting legislation to deport aliens, could not have been unaware of the fact that in the United States there were and would be aliens who became aliens because of the cancellation of their naturalization. The Supreme Court concluded that if Congress had desired to exempt a denaturalized citizen from the application of the immigration laws because he had been a citizen when the ground of deportation arose, provision to this effect would have been made. This consideration is pertinent today. The Immigration and Nationality Act of 1952 was enacted with considerable thought having been given to the cancellation of naturalization (Commentary on the Immigration and Nationality Act, pp. 86-87, Title 8, Aliens and Nationality (1953); S. Rep. No. 1515, 81st Cong., 2d Sess., 754-769 (1950)). The Act was the result of the study of "each of the thousands of provisions of our immigration and naturalization laws with the end in view of appraising their adequacy, force and effect and in conjunction therewith the judicial and administrative interpretations of the provisions of the law and the rules and regulations implementing them." (S. Rep. No. 1137, 82d Cong., 2d Sess. 2 (1952)) The Senate version of what became the Immigration and Nationality Act contains a proposal based on the law involved in *Eichenlaub* (S. Rep. No. 1137, 82d Cong., 2d Sess. 21-22) and the very law was incorporated in Section 241(a)(17) of the Act (8 USC 1251). We cannot find that Congress was not aware of the ex-

istence of *Eichenlaub* or the problem of the denaturalized person when it enacted Section 241(a)(4) of the Act. Furthermore, in connection with its study of the immigration laws, Congress had before it (S. Rep. No. 1137, 82d Cong., 2d Sess. 2) the following recommendation of the Special Committee to Investigate Organized Crime in Interstate Commerce:

> The immigration laws should be amended to facilitate deportation of criminal and other undesirable aliens. To this end, the committee recommends the adoption of the legislative proposal heretofore recommended by the Commissioner of Immigration and contained in section 241 of S. 716 (82nd Cong.), now pending before the Senate Judiciary Committee.[3]
>
> Some of the criminals who occupy key positions in criminal gangs and syndicates are alien-born. Some came into this country illegally. Some have never been naturalized. Others obtained naturalization certificates by concealing their criminal activities. (S. Rep. No. 307, 82d Cong., 1st Sess. 15)

It appears to us that this is some indication that Congress desired that a naturalized person whose naturalization was revoked should be made the subject of deportation proceedings, and that the deportation of alien criminal elements be facilitated whether or not they had been naturalized.

Counsel, relying upon the characterization of *Eichenlaub* in *Brancato*, contends that Eichenlaub is not applicable. In *Brancato* the court said that *Eichenlaub* did not apply to the "general deportation statute." This statement is dicta for the case had already been decided on the theory that an entry was required and Brancato had made no

---

[3] See testimony of the Commissioner before the Committee on March 26, 1951 (S. Rep. No. 307, 82d Cong., 1st Sess. 579) discussing grounds of deportation similar to that found in Section 241(a) of the Act and the additional proposal for the deportation of aliens who at any time after entry were convicted of crime and declared to be undesirable by the Attorney General.

entry since he had entered as a United States citizen. With due reference to the dicta of the circuit court, we would point out that the majority opinion in *Eichenlaub* made no attempt to distinguish the Act of 1920 involved from the general deportation statute and that Mr. Justice Frankfurter (joined in his dissenting opinion by two other Justices) was of the belief that "The court's decision has serious implications with respect to citizens denaturalized for reasons not involving moral blame, and who have, while citizens, committed one of a variety of acts not involving moral obliquity and certainly not endangering the security of the country but which nevertheless are covered by other statutory provisions in language similar to that before us." He gave as an example a provision of the general deportation statute which provided for the deportation of an alien convicted for violation of a narcotic law. Moreover, *Eichenlaub* has generally in both administrative and judicial opinions been considered as applying to the general deportation law (*e.g., Marks* v. *Esperdy*, 198 F. Supp. 40, S.D. N.Y. (July 5, 1961) and *Matter of P-*, 4 I&N Dec. 373).

Furthermore, it is most telling that Congress which presumably knew of *Eichenlaub* placed the ground of deportation involved there in the general deportation statute in 1952 when it was made a part of Section 241(a)(17) of the Act (8 USC 1251) and provision also was made for the deportation of aliens who violate current provisions of the 1920 Act found in 18 USC 791-794, 2388, and 3241. For what it may be worth, we must point out that *Mangaoang*, upon which counsel places such reliance, also did not concern the general deportation law (Immigration Act of February 5, 1917); it involved a special law relating to the exclusion and expulsion of subversives (Act of October 16, 1918, 40 Stat. 1012 as finally amended by the Act of September 22, 1950 (64 Stat. 987)). Lastly, it must be stated that *Talavera* involved the *general immigration statute.*

Counsel contends that it is improper to apply Section 241(a)(4) of the Act to one who was convicted while he was a citizen because such application makes ineffective the provisions of Section 241(b) of the Act which permit a court to make a recommendation against deportation within 30 days of passing sentence. Counsel relies upon *Gubbels* v. *Hoy*, 261 F.2d 952, C.A. 9 (1958). *Gubbels* involved the question as to whether a conviction of a military court could be a basis for deportability. The court held that since a military court could not make a recommendation against deportation, Congress had not intended to make its sentence the basis for deportation. The issue was the nature of the tribunal whose judgment Congress intended to be the basis for deportation. This is not the issue here, where as the special inquiry officer has pointed out, it was not the nature of the tribunal but the respondent's misconduct in obtaining naturalization improperly which prevented him from obtaining a recommendation against deportation. (Actually, the question of making a recommendation could have been raised by the respondent who had been fighting efforts of the Government to denaturalize him since at least October 1952 (Ex. 5, p. 2).)

Moreover, the fact that an alien has not had an opportunity to petition the court for a recommendation against deportation does not prevent his deportation for conviction of crime under a law which does provide for such recommendation. The right of the nation to expel aliens is absolute and unqualified (*U. S. ex rel. Circella* v. *Neely*, 115 F. Supp. 615, 626, N.D. Ill. (1953) aff'd sub nom *U. S. ex rel. Circella* v. *Sahli*, 216 F.2d 33, C.A. 7 (1954), certiorari denied 348 U.S. 964; and *Matter of L-*, 8 I&N Dec. 389, 390). See, *U. S. ex rel. Kalonis* v. *Davis*, 13 F.2d 630, C.A. 2 (1926); *Todaro* v. *Munster*, 62 F.2d 963, C.A. 10 (February 10, 1933); and *Matter of Y-M-*, 8 I&N Dec. 94. Moreover, the provisions calling for the deportation of convicted aliens and the making of recommendations against deportation have been in effect since 1917. Fili-

pinos convicted between 1917 and at least 1934 were nationals of the United States to whom the immigration laws did not apply. Yet, in 1934 Congress had no hesitancy in providing for the application of the immigration laws, including the 1917 Act, to Filipinos for acts which had occurred (and until 1946 would occur) while they were nationals. (See, *Mesina* v. *Rosenberg*, 278 F.2d 291, 296-297, C.A. 9 (1960)) Finally, there is still available to the respondent the benefits of that portion of Section 241(b) which prevents deportation of one who has obtained a pardon.

Several administrative decisions are pertinent to the issue as to the necessity of the coexistence of alienage and and the conviction. *Matter of L-*, 6 I&N Dec. 666 (1955) concerned an individual who had entered the United States as an alien in 1926. He became a United States citizen in 1931. He was convicted of four crimes in 1940. In 1950, he lost United States citizenship under Section 401(g) of the Nationality Act of 1940 which provided for the expatriation of a dishonorably discharged citizen who in time of war had been convicted by court martial of desertion. Deportation proceedings were brought under Section 241(a)(4) of the Act charging L- with having committed two crimes after entry. The Board sustained the order of deportation. Subsequently, the Supreme Court ruled that Section 401(g) of the Nationality Act of 1940 was unconstitutional (*Trop* v. *Dulles*, 356 U.S. 86) and because of this, on September 11, 1958 the Board withdrew its order of 1955 and terminated proceedings. Counsel in a supplemental brief presents the belief that the Board's order in 1955 was in error. He is of the belief the issue was given little consideration; that expatriation presents a different situation from a cancellation of naturalization; and that Mangaoang was distinguished administratively merely on the grounds relating to entry, ignoring the additional ground concerning the coexistence of alienage and the ground of deportability. We do not believe our decision

was in error. The issue was appropriately considered and decided on the basis of precedents including *Eichenlaub*.

Matter of S-, 5 I&N Dec. 678 (1954) concerned a person who while a citizen of the United States had been convicted of theft on three occasions. Subsequently, he lost his United States citizenship by taking an oath of allegiance to a foreign government. When he attempted to return to the United States, he was excluded under the Immigration and Nationality Act as one who had been convicted of crime involving moral turpitude prior to entry. The alien contended that at the time the offenses were committed he was not an alien but a citizen and was not excludable because he had never been convicted of crime as an alien. The Board held that the contention was without merit because the Act required the exclusion of persons who were aliens without excepting those who had been citizens and suffered expatriation. *Eichenlaub* was relied upon and *Mangaoang* was distinguished by reference to its third numbered paragraph. This paragraph points out that *Mangaoang* differs from *Eichenlaub* because in *Eichenlaub* the language "did not require a showing that at the time of conviction * * * the person in question had then been an alien" while in *Mangaoang* the language did require the person to be an alien. Counsel contends that S- was found excludable "because of the past-tense language of the statute involved" and that *Mangaoang* "was distinguished as being based on a present-tense statute similar to Section 241(a)(4)." We find no mention of tense as a reason for ordering S-'s deportation. The convictions in S- could have happened to either an alien or a nonalien, and the law did not limit deportability to those who had been convicted only as aliens. This was the basis of the decision. The same basis for decision was used in *Matter of M-*, A-11875663, Int. Dec. 1169 (July 16, 1961) which involved a native-born citizen of the United States who had been convicted of crime in 1951. He expatriated himself in 1959 by service in the armed forces of

a foreign state. He last entered in 1960. His deportation was ordered under the Act as one who had been excludable in 1960 as an alien convicted of crime prior to entry.

Matter of P-, 4 I&N Dec. 373 (1951) and *Matter of W-*, 5 I&N Dec. 759, 764 (1954) involved persons who entered as United States citizens and were ordered deported for having been convicted of crime, or having admitted commission of crime prior to last entry. Counsel is of the belief that deportation was ordered because the past tense was used in the laws. In these cases, decided before *Brancato*, the Board's decision was not based upon the tense of the statute involved but upon the fact that denaturalization stripped the individual of United States citizenship retroactively. There is no basis for concluding that the Board would have acted differently had the statutory language been written *in praesenti*.

Counsel contends that to find it possible to interpret Section 241(a)(4) to make the coexistence of alienage and conviction unnecessary would make the statute ambiguous so that a construction favorable to the respondent should be taken. The rule of the cases, however, is clear. When the law requires deportation for acts which can be performed or happen to either an alien or a citizen, nationality status at the time of the performance or happening is immaterial unless the law provides that alienage must be present. There is thus no ambiguity. Applying the rule to the language of Section 241(a)(4), we find that the act condemned-conviction can occur to either a citizen or an alien and that the law does not provide that the subject be an alien. Therefore, alienage at the time of conviction was not a necessity [4] and the charge is sustained if moral turpitude is involved and the crimes did not arise out of a single scheme of criminal misconduct.

[4] So that all major aspects of the case may be properly developed for judicial review, if it should take place, we shall subsequently discuss the issue as to whether the respondent must not be considered to have been an alien at the time of conviction.

SINGLE SCHEME

Counsel contends that the Service has failed to prove that the two convictions on which the order of deportation is based did not arise "out of a single scheme of criminal misconduct." The respondent had been indicted for filing false and fraudulent income tax returns for 1946, 1947, 1948 and 1949. The jury convicted the respondent for the years 1947, 1948 and 1949. He was sentenced to five years on each count to run concurrently and a fine was imposed. On appeal, the conviction as to 1947 was reversed.

At the deportation hearing, the respondent refused to testify. The Service presented the record of the convictions, showing in one count a violation of the law by the filing of a fraudulent return on January 14, 1949 for the calendar year 1948, and in the other count, a fraudulent filing of a tax return on March 10, 1950 for the year 1949. The Service then rested. In his defense, the respondent presented the summation of the prosecuting attorney at the tax evasion trial as evidence that the convictions arose out of a single scheme (Ex. 15). The summation reveals that the Government's case is built upon the net worth theory. Proof was made of the respondent's assets in 1946, the amount of income he reported for the years 1946 to 1949, the fact that he had spent twice the money he had reported as income for those years, and the fact that there was a source from which the additional income could have come to the respondent. The sums spent over and above that which could be attributed to the assets started with and income reported were alleged to be income concealed. The belief of the respondent sets forth several instances where the prosecuting attorney, in his summation, made the point that the respondent had so conducted himself over a period of years that he had spent twice as much as he had reported, defrauding the Government of taxes due. Great emphasis is put on this statement of the prosecuting attorney. "If the Frank Costellos can get away with

this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country * * * will carry the load * * *." (p. 1834, Ex. 4) The respondent also submitted a subpoena for Fennelly, an attorney, who had represented the respondent at the trial on income tax evasion. It was alleged that although not a participant, the witness allegedly had knowledge of the facts which would show a single scheme. Counsel explained that the request to subpoena Fennelly came after the death of Delaney, another of the respondent's attorneys at the tax evasion trial and one who had agreed to testify. The request was denied. Counsel then requested (and received) permission to submit affidavits from Fennelly and another person. However, affidavits were not submitted. The Government presented the summation of the defense counsel at the tax evasion trial (Ex. 17), an affidavit of Costello's in support of a motion for inspection of minutes of the grand jury (Ex. 18) and testimony of Sweeney, a defense witness at the tax evasion trial (Ex. 19).

The special inquiry officer ruled that the burden of proving that the convictions had not arisen from a single scheme was upon the Government and that in the absence of probative evidence to the contrary, a record of conviction failing to show acts in furtherance of a common plan would suffice to establish a single scheme did not exist. The special inquiry officer, relying heavily on *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, N.D. Calif. aff'd 253 F.2d 547, C.A. 9 (1958), certiorari denied 357 U.S. 920, where the facts are similar to those in the instant case, found that a single scheme had not existed.

Counsel contends the Service cannot bear its burden of establishing that the respondent's crimes did not arise out of a single scheme by merely introducing a conviction in the situation before us because there is nothing in the two successive tax evasions which negate singleness of scheme. Counsel contends the Service is under the ob-

ligation of making further proof that a single scheme was not involved. Counsel contends that *Chanan Din Khan* is wrong because it was decided in the belief that the burden of proof as to the single scheme issue was on the alien rather than on the Service, and because the term "single scheme" was equated with a single punishable crime. Counsel contends that these tests were rejected in *Wood* v. *Hoy*, 266 F.2d 825, C.A. 9 (1959).

Chanan Din Khan was reviewed in *Wood* and quoted from without criticism. It is, therefore, guiding authority for a situation such as was involved there. *Chanan Din Khan*, on facts very similar to those before us, held that an indictment showing convictions on two fraudulent returns filed a year apart is persuasive evidence that two unrelated crimes were involved. In the instant case, there is no probative evidence controverting the inference which flows from the commission of crimes a year apart. Certainly, the remarks of the prosecuting attorney at the tax evasion trial do not controvert the inference which flows from the convictions. The prosecuting attorney was concerned with the concealment of income from the Government to avoid payment of taxes. He did not have to prove that when the respondent took the first step to defraud the Government, that he intended to continue to do so for the next three years. The word "scheme" could have been applied to actions and plans which had as their end the filing of a fraudulent tax return if only one year had been involved. It was unnecessary for the prosecuting attorney to establish that there was a *scheme* to commit both violations in order to obtain a conviction. Moreover, even if this ambiguous opinion by the prosecuting attorney, made in the heat of advocacy, referred to a conspiracy for the four years, it would not be controlling as to the actual state of mind of the respondent. In fact, if the opinion of the prosecuting attorney were meant to express the belief that when the respondent filed his return for 1946 he conspired to defraud the Government in the next three years,

it was an opinion not shared by the jury which acquitted the respondent on the charge involving the year 1946.

Counsel cites *Matter of F-G- and C-D-*, 8 I&N Dec. 447, in support of his contention that the convictions in the instant case arose out of a single scheme. In the administrative decision cited, the first alien had been convicted on two counts of making a false statement for the purpose of obtaining unemployment insurance benefits. In count one he was charged with making the first false statement and in count two with making the second false statement a week later. The Board decided that it was proper to conclude that when the alien falsely represented he was unemployed to obtain benefits, he intended to do it again on the following week, although the inference might be too broad if attempt were made to extend it to the entire 26 weeks of benefits. In the instant case, it would be even less proper to infer that the intention to falsify the return filed in March 1950 was formed in January 1949 when the prior fraudulent return was filed (*Chanan Din Khan* v. *Barber*, supra).

Counsel contends that the net worth theory by its very nature prevents a showing that two crimes did not arise out of a single scheme. This contention is based on the belief that under the net worth theory, convictions for two successive years are possible upon proof of facts which show no more than that the indicted person received a sum of money in one year and spent it in two successive years without reporting what was spent as income in either year. In other words, the possibility is raised that in January 1949, the respondent evaded the payment of taxes then due on income which he had received in 1948 and that although in March 1950, he filed a return showing some income in 1949, it could have been from the same income concealed in 1948 that the money came which was spent in 1949 in excess of that reported. It is answer enough that there is no proof that the convictions for 1948 and 1949 were the result of a conspiracy to evade payment of

taxes for income which had been received only in 1948. On the contrary, the record of that trial reveals there was income for both 1948 and 1949 (Ex. 19, pp. 1679(a)-1681(a)). Moreover, an examination of the reported tax conviction case reveals the following pertinent charge to the jury.

> This [net worth] method involves determination of the defendant's net worth at the beginning and end of a period in order to foreclose the possibility that the expenditures were made, or the net worth increases were derived, from prior accumulated funds.
>
> • • •
>
> In order for you to find that sums received by the defendant during any of the taxable years constituted income to him, it is not necessary for the Government to have proved the exact source of the income. None of the alleged excess investments and expenditures made by the Costellos during any year shall be considered in determining the taxable income of the defendant Frank Costello in any year unless you find that there was an excess of expenditures and investments, and that it constituted money which the defendant received as taxable income during the year in which the money was spent. (*United States* v. *Costello*, 221 F.2d 668, 676, C.A. 2, aff'd 350 U.S. 354)

The net worth theory is a method for proving that a crime was committed during a particular year. Its use does not negate the possibility that the crimes were the results of independent volitions made from year to year rather than at one time in a particular year.

Moral Turpitude

We come now to the question of whether the special inquiry officer properly found that the respondent's convictions on two counts for violation of 26 USC 145(b) involve moral turpitude. The special inquiry officer, relying upon judicial precedents, found that fraud was an ingredient and that moral turpitude was present. The issue was fully

discussed by the special inquiry officer. Counsel contends that *United States* v. *Scharton*, 285 U.S. 519 (1932) and *United States* v. *Carrollo*, 30 F. Supp. 3, W.D. Mo., 1939, require a contrary finding. Similar contention based upon the cases cited by counsel was made in *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, 775, N.D. Calif. (1957), which concerned violations of the same section involved in the instant case. The court found that moral turpitude was present. The decision of the court was affirmed upon appeal 253 F.2d 547 and certiorari was denied 357 U.S. 920. We see no need to discuss this issue further.

We find no reversible error in the denial for the issuance of a subpoena for Fennelly. The issuance of a subpoena is a discretionary matter. While the respondent was entitled to produce evidence in such form as he desired, there was no abuse of discretion in denying the subpoena in the absence of some more specific statement as to the testimony which the witness could offer.

The respondent's deportability is established on the first charge because of convictions for evasion of taxes.

Relation Back Theory

Our conclusion is that alienage and conviction need not be coexistent; however, as we previously indicated, we shall consider the issue as to whether the respondent should be regarded as having been an alien at the time of the conviction since he has been denaturalized under Section 340(a) of the Act (8 USC 1451). The second provides that revocation "shall be effective as of the original date of the order and certificate." The special inquiry officer found the law to be that denaturalization is retroactive and confers upon the subject the status of an alien at all times and for all purposes, except that one who entered while naturalized may not be considered as having entered as an alien, and except that certain language providing for the deportation of an alien who is a member of a pro-

scribed organization, requires that there must be a coexistence of alienage and membership. The special inquiry officer ruled that since Costello fell in neither of the exceptions, he must be considered as having been an alien at the time of the conviction. Counsel contends that the "relation-back" theory should not be applied because judicial precedents require that a denaturalized person be regarded as if he had been a citizen before the denaturalization even though he was not lawfully entitled to be naturalized. We believe that the "relation-back" theory is properly applied here.

Prior to the Immigsation and Nationality Act, it was established that a revocation of naturalization, whether for fraud or for illegality, was retroactive (*U.S. ex rel. Brancato* v. *Lehmann*, supra). While there was general agreement that the denaturalized person must be considered as an alien from the time of the denaturalization, the rule of the cases appears to have been that the fiction that alienage existed at any particular moment in the past would not be indulged in if the individual would be required to do what was impossible of performance. Thus, the fiction was not indulged in where it would require an individual who entered as a United States citizen to have been in possession of the documents required of an alien (*Matter of C-*, 3 I&N Dec. 275, A.G., 1950). In the same vein, it was improper to consider one who did something as a national of the United States, as if he had done it while an alien (*Barber* v. *Gonzales*, supra). However, the relation-back doctrine was applied where it did not require the "impossible" of the alien (*Matter of P-*, 4 I&N Dec. 373).

Although it is the contention of counsel that it is improper to apply Section 340(a) to a deportation section, we see nothing in the wording or the history of this law (which at the minimum merely restates what was decided judicially) that would prevent its application to deportation proceedings. The section can be given effect in the

case before us without violence to precedents if we consider the respondent as an alien at the time he was convicted. The commission of crime or the conviction was not related to nationality. To consider the respondent as having been an alien at the time of the conviction imputes to him no action which he, as a citizen, could not have done. No impossibility is asked for. We believe it is proper for the purposes of Section 241(a)(4) of the Act to consider the respondent as having been an alien at the time of his conviction. (*Cf. Mesina* v. *Rosenberg*, 278 F.2d 291, C.A. 9 (1960))

Counsel contends that Congress could not have intended the relation-back theory to apply because in Section 241(b) provision was made for a recommendation against deportation, a provision which would be of use only to an alien. This contention has been previously considered; we pointed out that Congress has the power to deport an alien who had no access to a recommendation against deportation. Congress must have realized that the 30-day period within which such a recommendation could be made would have passed by the time of the denaturalization, and may have been content to permit the denaturalized person to resort to a pardon.

At oral argument, counsel expressed the belief that the special inquiry officer had used *Eichenlaub* as authority to give a retroactive effect to alienage (p. 4 of oral argument). Although the special inquiry officer gave a retroactive effect to the denaturalization, he did not use *Eichenlaub* as authority for this. (See last sentence on p. 15 of the special inquiry officer's opinion.) The special inquiry officer relied upon the statutory declaration in Section 340(a) of the Immigration and Nationality Act (p. 18 of special inquiry officer's opinion).

The special inquiry officer found the respondent deportable on the first charge. The first charge is superfluous; it is contained within the third. The record does not estab-

lish the respondent's deportability on the second charge for the reasons stated by the special inquiry officer. The respondent's deportability on the third charge is sustained, based on the tax evasion convictions; deportability on the basis of the other convictions has not been established.

The findings of fact and conclusions of law of the special inquiry officer are adopted except Conclusion of Law No. 3 will be amended to eliminate the convictions in 1954 for tax evasion as grounds on which the respondent is not deportable:

> (3) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act based on conviction for two crimes after entry (contempt of Congress in 1952; contempt of court in 1957).

ORDER: It is ordered that the appeal be dismissed.

IT IS FURTHER ORDERED that the respondent be deported from the United States in the manner provided by law on the third charge of deportability based solely on the income tax convictions.

• • • • • • • • • • • •

Notice of Direction of Deportation to Italy

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
20 WEST BROADWAY, N. Y. 7, N. Y.

NOTICE TO ALIEN OF COUNTRY TO WHICH HIS DEPORTATION HAS BEEN DIRECTED AND PENALTY FOR REENTRY WITHOUT PERMISSION

File No.: A12 143 440 DB
Date: January 11, 1962

Mr. Frank Costello
aka Frank Castiglia
115 Central Park West
New York City

Dear Sir:

Pursuant to the order of deportation in your case and Section 243 of the Immigration and Nationality Act, your deportation to ITALY has been directed. You should arrange your personal affairs accordingly.

After deportation, unless the Attorney General has expressly consented to your reapplying for admission, if you enter, attempt to enter, or are at any time found in the United States, you will be guilty of a felony, and, upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

Very truly yours,

MASIL J. MASON
Masil J. Mason
Supervisory Deportation Officer

cc: EDWARD BENNETT WILLIAMS, ESQ.
1000 Hill Building
Washington, D. C.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. .....

FRANK COSTELLO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of Deportation Order

The above-named petitioner hereby seeks review by this Court, pursuant to Public Law 87-301, 8 U.S.C. § 1105a (1961 Supp.), 75 Stat. 651, of an order of deportation issued against him on January 2, 1962. In support hereof, petitioner states:

1. Petitioner is a native, but not a citizen, of Italy. He entered the United States on April 2, 1895, at four years of age, and was naturalized on September 10, 1925. He is married to a United States citizen.

2. Petitioner is a resident of this judicial circuit.

3. On May 17, 1954, petitioner was convicted of attempted evasion of his federal income taxes for 1947, 1948 and 1949. On appeal, this Court reversed the conviction as to the 1947 count and affirmed as to the other two counts. *United States* v. *Costello*, 221 F.2d 668 (1955).

4. Petitioner's United States citizenship was revoked on March 9, 1959, by order of the District Court for the Southern District of New York, which order was affirmed by this Court in *United States* v. *Costello*, 275 F.2d 355 (1960), and by the Supreme Court in *Costello* v. *United States*, 365 U.S. 265 (1961).

5. On March 31, 1961, respondent commenced deportation proceedings against petitioner by serving upon him

a warrant of arrest, order to show cause and notice of hearing.

6. A hearing was held on May 23, 1961, before a special inquiry officer who, on June 21, 1961, ordered petitioner's deportation under § 241(a)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(4), upon the ground that he had been convicted, after entry, of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: the two counts of attempted tax evasion.

7. On petitioner's appeal to the Board of Immigration Appeals, that Board, on January 2, 1962, issued a decision dismissing the appeal and making the order of deportation to which the instant petition for review is directed.

8. The said order of deportation is void and contrary to law, in that:

(a) The Board erroneously construed § 241(a)(4) of the Immigration and Nationality Act as authorizing the deportation of a person who was convicted of two crimes while he was a citizen of the United States and who was thereafter denaturalized.

(b) The Board erroneously concluded that the revocation of petitioner's citizenship in 1959 related back to 1954, so that he was actually an alien at the time of the convictions in question.

(c) The Board erroneously affirmed the conclusion of the special inquiry officer that, "in the absence of probative evidence to the contrary," the respondent could sustain its burden of proving that the two crimes did not arise out of a single scheme of criminal misconduct simply by proving "a record of conviction failing to show acts in furtherance of a common plan. . . ."

(d) The Board's conclusion that the two successive attempted tax evasions of which petitioner was convicted did not arise "out of a single scheme of criminal misconduct" is not supported by reasonable, substantial and probative evidence on the record considered as a whole.

(e) The Board erroneously concluded that a record of conviction of attempted tax evasion in two successive years, founded on proof that the taxpayer's expenditures during the two-year period exceeded the sum of his opening net worth and his reported income, is sufficient to prove that he committed two crimes "not arising out of a single scheme of criminal misconduct."

(f) The Board erroneously sustained the action of the special inquiry officer in denying petitioner's application for issuance of a subpoena to command the testimony of one Leo C. Fennelly on the "single scheme" issue.

(g) The Board erroneously concluded that the violations of 26 U.S.C. § 145(b), of which petitioner was convicted, necessarily involved moral turpitude.

9. The validity of the order herein complained of, a copy of which is appended hereto as Exhibit A, has not been upheld in any prior judicial proceeding.

WHEREFORE, Petitioner respectfully prays for an order:

(a) Declaring that the deportation order issued against him is null and void and contrary to law.

(b) Restraining respondent from apprehending, detaining or deporting petitioner.

(c) Directing respondent to enter an order terminating the proceedings against petitioner.

(d) For such other and further relief as may be appropriate.

/s/ Edward Bennett Williams
Edward Bennett Williams

/s/ Harold Ungar
Harold Ungar
1000 Hill Building
Washington 6, D. C.

Attorneys for Petitioner

Indictment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

—against—

Frank Costello,

Defendant.

The Grand Jury charges:

1. On or about the 14th day of March, 1947, in the Southern District of New York, Frank Costello, the defendant, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, in the Borough of Manhattan, City of New York, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $23,673.90 and that the amount of tax due and owing thereon was the sum of $8,338.72, whereas in truth and in fact, as he then and there well knew, his net income for the said calendar year was the sum of

$31,630.54 upon which said net income he owed to the United States of America an income tax of $13,224.88.
[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

SECOND COUNT

The Grand Jury further charges:

1. On or about the 9th day of March, 1948, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1947, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America, for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return, on behalf of himself and his said wife, wherein it was stated that their net income for the said calendar year was the sum of $17,307.23 and that the amount of tax due and owing thereon was the sum of $5,085.94, whereas, in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $72,561.45 upon which said net income there was owing to the United States of America an income tax of $41,215.53.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

THIRD COUNT

The Grand Jury further charges:

1. On or about the 14th day of January, 1949, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1948, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and

his wife to the United States of America for the calendar year 1948 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for said calendar year was the sum of $12,325.30, and that the amount of tax due and owing thereon was the sum of $2,153.48, whereas in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $47,619.92, upon which said net income there was owing to the United States of America an income tax of $15,965.22.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

FOURTH COUNT

The Grand Jury further charges:

1. On or about the 10th day of March, 1950, in the Southern District of New York, Frank Costello, the defendant, who, during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949 by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York in the Borough of Manhattan, City of New York, a false and fraudulent joint income tax return on behalf of himself and his said wife wherein it was stated that their net income for said calendar year was the sum of $22,110.70, and that the amount of tax due and owing thereon was the sum of $4,910.94, whereas in truth and in fact, as he then and there well knew, their joint net income for the said calendar year was the sum of $61,739.18, upon which said net income

there was owing to the United States of America an income tax of $23,521.40.

[Section 145(b), Internal Revenue Code; Title 26, U. S. Code, Section 145(b).]

MYLES J. LANE,
United States Attorney.

Foreman

. . . . . .

Judgment and Commitment

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C141/9

UNITED STATES OF AMERICA

v.

FRANK COSTELLO

On this 17th day of May, 1954 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife for the years 1947-1948-1949, by filing false and fraudulent joint income tax returns Sec. 145(b) Internal Revenue Code; Title 26 U. S. Code, Section 145(b) as charged in counts 2-3-4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years and fined $10,000. on each of counts 2 3-4. Prison sentence on counts 2-3-4 to run concurrently with each other. Total fines of $30,000. to be paid or defendant to stand committed until fines on counts 2-3-4 are paid or he is otherwise discharged according to law. Defendant to pay the cost of prosecution as taxed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN F. X. MCGOHEY,
United States District Judge.

A True Copy. Certified this 17th day of May, 1954.

(Signed)
WILLIAM V. CONNELL,
Clerk.

(By)
J. A. JOHNSON,
Deputy Clerk.

Summation on Behalf of The Government

Mr. MacMahon: Judge McGohey, Mr. Foreman, and ladies and gentlemen of the jury: The Government has proved that Frank Costello cheated and defrauded the Government out of income taxes of at least $52,000 for the tax years 1946 through 1949.

Now, when we made our opening statement we promised you that the Government would prove that Frank Costello wilfully evaded his income taxes in each of those years. We told you that we would prove this by what he spent and by proving to you that he spent a lot more money than

he reported on his income tax returns in those years. We also told you we would prove it by what is known as the net worth expenditure method.

Now, the essence of this method is that you prove that a man is spending more than he is reporting on his income tax returns and that he did not have the money to start with. Now, how do we find out what Costello had to start with?

We proved to you what he was worth on October 18, 1937, and we did it by using the world's best expert on what Costello was worth at that date—Frank Costello (2302) himself. We showed you and read to you a statement that he gave under oath to an official representative of the United States Treasury.

Now, counsel has suggested that this was something of a careless statement, that Costello was caught unawares. Well, ladies and gentlemen, this statement, Exhibit 23, is signed on every single page. You will recall that Costello came back the next day, he read over the statement and he initialed it, and he signed it, on every page, he made corrections in it, and he changes "brother" to "brother-in-law," he initials the change; he makes another correction over here (indicating), "Kastel wanted to see me make some money. Frank Costello." And so on throughout. He had time to think about it, ladies and gentlemen, and he did.

And then we went on to prove that from that time, October 18, 1937 up until December 31, 1945 Costello spent and invested over a half a million dollars, and that this was $202,000 more than he reported on his income tax returns for that period.

Think what this means! From 1937 up to the first prosecution year, January 1, 1946, Costello spent $202,000 more than he reported on his income tax returns.

We promised you that we would prove exactly what Costello was worth on January 1, 1946, and we kept (2303) track of those resources year by year, we found out what they were and we kept track of them year by year, from 1946, 1947, 1948 and 1949, and we proved to you that in those four years Costello invested and spent $330,000 out of income and that he reported on his income tax returns less than half that amount.

Think of this! In this four-year period, Costello reported less than one half of the taxable income he received. He received income that he did not report in the amount of $158,000.

How did we go about proving this case? We proved these investments and expenditures of Frank Costello by calling 150 witnesses to that stand. Who were these witnesses? They were his lawyer, they were his accountant, they were trades people, storekeepers, mechanics, barbers, tailors and so on; and more than that, we proved this case by over 365 documents that were received in evidence. What kind of documents were these? These were public records, deeds, mortgages, bank deposit slips, bank records, checks, cash sales slips, cash books, ledgers, and affidavits, and sworn testimony of Frank Costello.

And we promised that after all these witnesses had testified and all these documents had been received in evidence that we would put an expert on the stand to (2304) do the arithmetic. We put Mr. Leath and Mr. Sohn on the witness stand and they did that arithmetic.

There are a lot of figures in that arithmetic, but it is simply a matter of two and two make four. That arithmetic is on the schedules which have been received in evidence here as Exhibits 362 and 363. They summarize all the details of this proof. They aren't just cold figures. For every figure on those exhibits you heard a witness testify or there has been a document received in evidence.

Those schedules and any other documents in this case are available for you during your deliberations. If you want them, all you have to do is ask for them, and I hope you do.

There has been a lot of evidence here going back to 1935, 1936, 1937, but the important year here is 1945. How much did Frank Costello have in hand at the end of 1945? That is the important figure.

The purpose of going back to 1937 and tracing Costello's assets was to show you what happened to them and to show you that they weren't on hand and available to spend during the prosecution years from 1946 through to 1949.

We traced Costello's financial dealings up to December 31, 1945 to give you a solid beginning net (2305) worth to go into the prosecution years.

What does the proof show about this period from 1937 up to 1945? The proof shows that Frank Costello spent or invested out of his current income over $202,000 more than he reported on his tax returns.

Now, this is a large figure, and it is very significant. It is this figure, $202,000, which guarantees the accuracy of the opening net worth in December 1945.

Before the defense can make any attack on the starting point net worth in December 1945, they have to explain away that $202,000.

How do they go about explaining away this $202,000? First, they complain that the Government has put in $9,500 for Costello's investment in the Phil Kastel partnership on October 18, 1937. They say the figure should be fifteen thousand, a difference of five thousand five hundred because Kastel in 1939 testified that he had put in $15,000; but in 1937, two years closer to the event, and remember his records were memorized, he said that he put in $9,500. That is the figure we used.

The next point of attack is the 1937 Cadillac Costello said he had on October 18, 1937. Mr. Gearhart from the Cadillac Motor Company took the witness stand, (2306) he brought his records with him, and he told you that that Cadillac had cost about $4,500. He also told you that it was turned in in 1941 for $250. So we know that Costello did not get any of this excess, $202,000, out of selling that Cadillac.

The next item the defense questions does not stand up any better. Costello reported income from the Kastel partnership in 1937 of some $66,000, and the defense argues that the Government has not given Costello credit for this money. The evidence shows that this money had been received by Costello before October 18, 1937, before he gave his statement.

And what was left of it was in the $30,000 cash that we give him credit for. You will remember that Mr. Matheny, the agent from Mississippi, told you that he had seen the Bayou books. Now, those books weren't produced. Mr. Matheny saw them, and he told you that the last installment of this money, some $12,000, was in Kastel's hands by June of 1937. Under Costello's arrangement with Kastel, Costello was entitled to half of the money. Costello, himself, said in October, when he gave his statement, that he got his money from Kastel weekly, monthly, regularly, and that the last time he got anything from Kastel was about three months before and that he got it in cash. (2307). So we submit to you that that cash was on hand at the time he gave that statement.

So the evidence shows that none of these items should be included in the net worth. But let us assume the contrary. Let us assume that these items, which total some $76,000, should be included. What does this do to the December 1st, 1945 starting point? It does nothing. It simply reduces the unexplained $202,000 by that amount and it still leaves $120,000 to go before you affect that

opening net worth in December 1945 by so much as a dollar.

Now, the only other item that the defense questioned during this period from 1937 up to the end of 1945 was the money Costello spent for flowers at Annenberg & Erickson, $2,000 a year. Now, Mrs. Leichner, the lady who ran that flower shop, told you that Costello spent that money during that period, that her records had been destroyed. But was she likely to forget a customer who spent that much money in her store? But the most interesting thing about this flowers business is not the $2,000 a year. There never was any account in that store showing that Frank Costello spent any money for flowers. The account was carried in the name of C. Frank. And you all remember the trouble we had trying to show who C. Frank was. I am (2308) sure you haven't forgotten Miss Takata. How many other accounts are there around town in the name of C. Frank or some other fictitious name that the Government was never able to find? Ask yourself that question when you retire to the jury room.

Now, the only defense witness here was Mr. Sweeney. He prepared a couple of schedules that he was hired to make. The first one was marked III, and Mr. Sweeney claimed that this schedule showed that Costello had some $84,000 cash on hand in December 1945. But you will remember that this figure started to melt away on cross examination. First of all, it turned out that the figure included the bank balances of some $29,000. Then it turned out that it included the $27,200 that Costello had lost in the taxicab and which Sweeney said was some kind of an escrow account. And then there were some other items which Mr. Sweeney admitted were in error, and after all these corrections we had him compute and total them up for you on the witness stand, and that $84,000 melted to zero. That schedule, ladies and gentlemen, was a phony.

If you will, think back to the way Sweeney acted on this witness stand. Did he give frank, straightforward answers to straightforward questions (2309) or did he evade? I ask you to listen to his Honor when he charges you on how you judge the credibility of a witness. Mr. Sweeney's only function and the function of his schedules was to confuse you and to mislead you. And I am sure you won't be fooled by it.

So the plain fact is here that the proof establishes that the net worth starting point on January 1, 1946 is wholly accurate and completely sound.

Now, let us come to the prosecution years. The proof shows that in the year 1946 Costello's income was $53,000, but he only reported a little over thirty-five thousand.

The proof shows that in the year 1947 Costello's income was over one hundred and two thousand but for the same year he reported a little less than $37,000 on his income tax return.

The proof shows that in the year 1948 Costello's income was over $70,000 but he reported less than half of that, about thirty-three thousand.

The proof shows that in 1949 Costello's income was over $91,000 but his 1949 tax return shows less than thirty-eight thousand.

Thus, during the prosecution years Costello (2310) had income, according to the proof, of at least $317,000. During those same years he reported on his tax returns income of $158,000. Think what that means. It means that during the years covered by the indictment Costello concealed from his Government over $158,000 in income. Based only on the expenditures that we were able to find and to prove, Costello concealed over half of his income during this period.

Now, let us look at the few items the defense questions on the schedules covering the prosecution years. First, there was the matter of the adjustments made to the change in net worth in 1947 and in 1948 in order to account for losses suffered in those years.

Now, the thing to notice there is that that adjustment is to the change in net worth, not the net worth itself. Those losses were subtracted from the net worth, and when you make that subtraction at first blush it seems that that is money that you drew out of something and had available to spend. But you and I know that you can't spend money you have lost, you can't use it any more. And to state and to show that accurately and truthfully when you come to compute the change in net worth, you have to add that figure back in there because you know you didn't get any money from (2311) that source to spend.

Now, the only other item the defense questioned was the investment in Louisiana Mint Company as it was shown on the net worth schedule for January 1, 1946. The argument is that the investment in Louisiana Mint should have been shown at about $5,000 more than it was on January 1, 1946, because the money was distributed to Costello in December 1945. The trouble—because no money was distributed to Costello in 1945. The trouble with the argument is that the books of Louisiana Mint show that the money was distributed in December 1945. You heard that exhibit and that page from the books read a dozen times during the course of this trial, and the books say "Distributed in December."

Now, the defense argues that Murphy's report to Costello does not show this distribution and that his cash balance would be off if that distribution had not in fact been made. But the trouble with this argument is, Murphy would not have any way of knowing whether his cash balance was off or whether it wasn't. He is a certified public accountant, but he is not a mind-reader. Murphy told you

that he didn't even know where the cash of Louisiana Mint Company was kept, he was never allowed to count it; so he had no way of verifying cash.

(2312) You also remember that Murphy told you that sometimes Kastel would make the distribution to Costello and then Kastel would come in and tell Murphy that he had made it and then Murphy would enter it on the books. Now, isn't it perfectly plain that that is what happened here? Kastel made the distribution in December and he came in in January and he told Murphy about it, and Murphy put it down in the books "Distributed in December."

Now, Mr. Sweeney in his schedule covering the prosecution years prepared what he called a cash receipts and disbursements schedule, and in doing so he accepted some of the Government's figures. But the only thing wrong is that he accepted the figures which were to his advantage and he left out the ones that hurt the defense. The result was that by taking some of our figures and disregarding others he wrote up a schedule that gave a completely false picture of the calculation he claimed to be making.

You will remember that Mr. Sweeney's schedules start each year with a cash balance figure and then he computed what the cash balance should have been at the end of the year. He explained that the words "cash balance" included the amount of cash in the banks.

(2313) Now, a perfect example of what is wrong with Mr. Sweeney's schedule is that he computes the total amount of the cash balance at the end of 1945 as $20,000, while if you add up the bank balances shown on the records of the various you will find that there was over $67,000 on deposit in the banks at that time. Now, Mr. Sweeney says there only should be twenty. The banks say they had sixty-seven thousand. A difference of $47,000. And if you make the same comparison at the end of 1948 you find that Sweeney is off another $15,000 from what the banks say.

Now, I don't know whose word you are going to take, but do you think the banks would have set up this total of $62,000 more than Sweeney says they should have had unless those banks actually had that money? And if you think about it for a minute you suddenly realize that the difference between what Sweeney says the cash balance should have been and what the cash balance actually was is the income that Costello did not report on his tax returns.

The same fact hits you squarely in the eyes when you look at some of the figures Sweeney put on his schedule. He lists a large amount of bank deposits from unidentified sources and he concedes that those were cash receipts. He shows over fourteen thousand in 1946, over eighteen thousand in 1947, over twelve (2314) thousand in 1948, and over four thousand in 1949.

Now, he labeled these non-taxable receipts, but he admitted that he based that conclusion on the bank statements. Now, I ask you when you go to the jury room to look at those bank statements and see if you find any such label on the statements.

You have to take all the evidence in this case to determine whether those are taxable or non-taxable cash receipts.

The Government has proved what Costello's true income was during the period from 1946 through to 1949. Agent Sohn took the witness stand and he computed the tax on that true income and, in doing so, he gave Costello the benefit of every doubt. He gave him every deduction for which there was any possible basis, even though Costello himself had not claimed it on his original tax return.

The total amount of tax Costello evaded during these four years was $52,239.

The Government proved that in 1946 Costello concealed $18,000 of his income and thereby evaded $1,143 in taxes.

In 1947 Costello concealed $68,798 of his income and thereby evaded taxes of $13,786.

In 1949 Costello concealed $37,832 of his (2315) income and thereby evaded taxes of $14,746.

In each of these years the Government has proved that Frank Costello evaded a substantial portion of his tax and his Honor will probably charge you that that is all that is required on that phase of the case.

You have seen throughout this trial witness after witness take this stand and testify that the records had been destroyed, and don't forget all those cash deals where there aren't any records. It must be plain to you that we only been able to prove a fraction of Frank Costello's true income for this period.

Let us take a look 1946, for example. In these expenditures for 1946 there is only one item for food, $8.46 to the Milkman. $8.46 for food in a year in which the Costellos spent over $8,000 to maintain their residences at 115 Central Park West and at Sands Point and almost $2,000 for clothes. Was that all the money they spent for food, $8.41? What part of your budget goes for food?

And look at the telephone bills. We show $51 in 1946, 1947 and 1948, but in 1949, the only year where there were available records, we have proved almost $450, nine times as much.

(2316) Let us look at another year. Over $7,000 was spent for clothes in 1947 and $11,000 to maintain their residences compared with less than a thousand dollars for food and nothing for gas and oil for their car, or for the movies, or for entertainment, or for dining out. Ask yourselves, if a husband and wife, who spent so much money for clothes and hotel bills and their two homes, could spend only a thousand dollars a year in those years for food for themselves and for two maids.

As I have said before here, the evidence shows that from 1937 through 1949 Costello spent over $202,000 more than the amount he reported on his tax returns. And the evidence shows that during the years 1946 through 1949 the excess was over $150,000. So for the whole period from 1937 through to the end of 1949, the excess is over $350,000, and the Government's proof shows that none of this was reported as income.

Where did this money come from? You cannot tell precisely where it came from; and his Honor will tell you, I believe, that we don't have to. But you can get some pretty good ideas where this money came from from the evidence in this case. It came from gambling, it came from cash dealings, and from cash businesses, and it came from miscellaneous.

(2317) Let us take some of the particular places where it could have come from. Let us take Louisiana Mint Company. Louisiana Mint Company was a slot machine business, run by Kastel down in New Orleans. The way the slot machine business works, Murphy told you, is that you put slot machines out in locations and you divide the profits with the locations. And it is a big money business.

The defense has made a great show of the fact that Kastel reports every penny of income shown on the books of Louisiana Mint Company. Of course he did. His figures had to agree with the figures shown on those books. But how were those books made up? They were made up from recapitulation sheets that didn't even show the names of the man who collected the money from those slot machines. Those collection slips were never shown to Murphy, their own accountant. All he had was Kastel's word in the form of those recapitulation sheets.

Yet every penny, down to how much it cost for newspapers, is supported by an underlying bill or a voucher or a memorandum. You saw those exhibits. We passed them to you at the time.

Now, the juke box business, that was put in Mrs. Costello's name, did have collection slips, showing (2318) how much money was taken out of each machine. Where are the slips that were signed by the people who took the money out of the machines for the Louisiana Mint Company? Why weren't they shown to Murphy, their own accountant? Just look at this company. It never had a bank account. Murphy told you he didn't even know where the cash was kept; that he was never allowed to count it.

Kastel got some of his distribution from the Louisiana Mint Company in cash, and when Murphy sent money to Costello, Murphy got the cash from Kastel. Isn't this one way Costello could have got some of this extra income?

Now, take the other Louisiana venture, Beverley Country Club. That was a plush gambling casino, the plushiest one in the South, and it operated during the post-war boom. And gambling casinos are big money businesses.

This gambliing casino has the most elaborate records imaginable to support how many steaks were served, how much the hatcheck girls got, the number of tips the waiters got, the number of drinks that were served across the bar, it has adding machine tapes, bar checks, inventory records, cash register tapes supporting vouchers, voucher registers, three and a (2319) tons of records to support an enormous loss on the restaurant end of the business.

What did it have to support the income and the receipts of the gambling casino? Pencilled sheets of paper made up on a daily basis, but they were only entered into the permanent books in ink once a year. Murphy told you that he had authority to write checks on the restaurant bank account but they kept him away from the casino. Why? Unless they had something to hide or conceal. Murphy told you that those summary sheets on the profits of the gambling casino had to have underlying memoranda in back of them; and if you look at them, you will see they are all odd numbers. You couldn't possibly carry them in your head;

you would have to have underlying memoranda. Murphy never saw them; you never saw them.

Murphy also told you that the casino loaned money to its customers. He told you that he never saw the accounts receivable, and neither have you. There is no way of telling how much was loaned, how much was paid back, who paid it back and when they paid it back. We are left completely in the dark about it. Why? What was there to hide and conceal?

Then there is this miscellaneous on Costello's (2320) tax returns. We know miscellaneous was from gambling income but the big thing we don't know about miscellaneous is how much was that gambling income. Who was there around to check what your gambling income is? There is no employer to take it out of your pay, the way you or I have to pay our taxes. There is somebody to check on how much money we get. Who was to check on Costello on his gambling winnings and his "miscellaneous"?

The defense speculates that all of these excess expenditures, $350,000 worth of them, were made out of money that belonged to Mrs. Costello. It is plain that they weren't made out of any income Mrs. Costello had. Costello himself testified and admitted that Mrs. Costello had no income from 1937 through to 1944, and that she had no income from 1947 through to 1949, and that the only income she had for the years 1944 through 1946 was the income she reported on her tax return.

You will remember that on the schedules we showed you, Exhibits 362 and 363, we allowed Costello credit for every penny of Mrs. Costello's income. We subtracted that right out of the picture, and when we did that, I think you will agree, we gave him the benefit of the doubt. And by doing so, we made absolutely sure that the rest of those expenditures (2321) came from his income. Because that is absolutely sure, the defense is forced back to the argument that Mrs. Costello had cash on hand before October 18, 1937

of some $350,000 and that this money was still being spent in 1949.

Right on the face of it, that argument is ridiculous. There isn't a shred of evidence in this case to support it, and there is plenty of evidence that Mrs. Costello had no such nest egg hidden away under the mattress or in a teapot some place.

On October 18, 1937 Mrs. Costello had a bank account which was kept at the Hudson River branch of the Corn Exchange, and the balance in that bank account was about $1,100, and we give Costello credit for that $1,100 in the starting point 1937. That is the only bank account she had.

The defense has kept suggesting that she had another bank account at the 86th Street branch of the Corn Exchange Bank, but their own exhibit, defense Exhibit GG, shows that that was not so. The exhibit says in plain English that the account was previously maintained at that other branch.

And if you will recall, the transfer was made right at the time the Costellos moved from the neighborhood of the old bank to the neighborhood of the new one. (2322) So isn't it plain to you that this bank account that we found is the only one in existence at that time?

Let us look at some of the other evidence in this case that shows that this is a fiction and a figment of the defense's imagination. On October 18, 1937 there were outstanding income tax liabilities against the Costellos running back to 1926. Those were being paid off on the installment plan, $300 a month. And meanwhile, those tax liabilities were running interest at 6 per cent, and they weren't paid off in full until 1947.

If Mrs. Costello had all this cash, why was this debt left hanging over their heads so long at 6 per cent interest?

In 1941 a Cadillac was bought in her name, and it was purchased on the installment plan, just like anyone else

buys a washing machine or a television set, and you don't do that if you have got $350,000 cash.

Costello borrowed on his life insurance policy. Isn't that the last place you would go when you need cash? Do you borrow on your life insurance if your wife has got $350,000 cash?

And then, why did he have to borrow $50,000 from Frank Erickson in the prosecution years if she had $350,000 cash? And he paid Erickson 4 per cent interest. (2323) You don't do that if you have got ready access to $350,000 or any part of it.

The defense asks you to take at its face value the assertion that the investments and expenditures in Mrs. Costello's name were made with her own money. Let us take a look at some of these and see whether it was her money or Costello's money.

The first investment in her name was a house and lot in Southold, Long Island for $4,000. That was made in 1940, and before Mrs. Costello had one penny of income of her own. She had a bank account at that time but there is no withdrawal to match in date and amount that $4,000. Where did she get the money? Who was getting the cash at this time? Her husband, Costello.

The next investment was the Crescent Music in 1943, and this investment was made in cash. The agreement that you have seen says so. And there is no withdrawal from Mrs. Costello's bank account to match that investment.

(2324) And the interesting thing about that agreement, ladies and gentlemen, is that it is the only partnership agreement we have seen in this case, and I suggest to you that it is a mighty handy record for the defense to have. Why weren't there such formal agreements on all these other partnerships with Kastel and Meyer Lansky down in the Beverley Country Club and in the Louisiana Mint Company? That is the only formal partnership agreement

in the whole case, and it was made, that $10,000 investment, before Mrs. Costello had any income or money of her own to make it.

Then in 1944 there was the purchase of the house at Sands Point. This was paid for with $18,000 in cash. You heard Mrs. Adoue on the witness stand tell you that. Costello was present when the $18,000 was handed over. Once again there is no withdrawal from Mrs. Costello's account to match that $18,000. And it was made, that investment, before she had received any income from any place.

Now, the next income in her name was the one at 79 Wall Street, which was bought for $52,500 in cash, and the defendant delivered that money to George Wolf. The only difference between 79 Wall Street and these other investments is that, for some reason, Costello admitted that he owned the stock in 79 Wall Street (2325) Corporation. By this time, the time of this 79 Wall Street investment, both of them had bank accounts, and there is no withdrawal from either account to match that $52,500 investment.

Every single one of these investments was made in Mrs. Costello's name before she had a penny of income from Crescent Music Company. And every one of them was made in cash. And who was getting the cash during this period? Costello. He testified in 1937 and 1939 that he was getting cash from Kastel regularly.

Now, let us take the Consolidated Television investment made in 1947. The defense argues that this was an investment of Mrs. Costello because some of the money was returned to her after the investment was withdrawn. But it was Costello who turned the $22,000 in cash over to George Wolf, and the investment was made in Wolf's name, not Costello's. Once again there is no withdrawal from either of their bank accounts to match this $22,000. And Wolf testified that he got the money from Costello in cash. And you remember, later on Costello gave Wolf another $5,000 to make a loan to Consolidated Television, and once again

this was in cash. And there is no withdrawal from his account or Mrs. Costello's to match that $5,000.

(2326) Now, let us take the purchase of the lots in Hollywood, Florida, in 1948. You remember there the deed ran to Dudley and Ann Geigerman, Mrs. Costello's brother, but remember Geigerman was also Costello's partner in these various Louisiana gambling ventures. And look at the way that transaction was handled. Within a few weeks after the deed to Geigerman there was a quit-claim deed made to Mrs. Costello, but it was not recorded for a whole year. If you went to the public records to find out who owned that property you didn't find Costello, you found Geigerman. They didn't even tell the lawyer, Beckerman, down there who the real purchaser was.

Now, is there any reason for concealing the purchase of a piece of property, unless you have got something to hide? And here, again, there is no withdrawal on either of their bank accounts to match the purchase price, $20,000, on those lots.

Wolf testified that he represented the Costellos from 1943 through to the end of 1949, yet he never received a fee from Mrs. Costello. All of them were paid by Frank Costello.

Now, what about the expenditures? Throughout the trial—

Does your Honor want to recess at this time?

(2327) The Court: Will that be agreeable to you?

Mr. MacMahon: It is all right.

The Court: All right, we will take a recess.

(Short recess.)

Mr. MacMahon: I was just commending to talk about the expenditures. And you noticed throughout this trial that the defense has made a great show of accounts in

the name of Mrs. Costello. Now, as far as the ordinary expenditures are concerned, we know that that is nonsense. It is the wife who does the shopping but it is the husband's money which pays the bills, and there is plenty of evidence to show that that was the case here.

In 1937 Costello testified that his wife was dependent upon him. In 1939 he testified that he gave his wife all the money that went into her bank account.

In 1943 he admitted through his attorney that he gave her all the money spent for their living expenses, such as rent, clothes, insurance, food and so forth, and that he gave her the money that bought that 1941 Cadillac.

The application for Mrs. Costello's life insurance reveals that she was dependent upon Costello for support. Some of the drawings from the Louisiana Mint Company went into her bank account, but that was in Costello's name, Louisiana Mint Company. Some of (2328) the salary from 79 Wall Street went into her bank account. In 1948 and 1949 withdrawals from his bank account go into her bank account. When we have Recordak checks we don't have them for most of this period. There are, regularly, monthly checks from his account to hers.

Now, even Mr. Sweeney admitted on cross examination that the defendant Costello gave Mrs. Costello sixteen thousand to put in her bank account in 1949, $17,700 in 1948. And, besides that, look at all the cash deposits in that account in 1947 and in 1946. The plain fact is that the money in Mrs. Costello's bank account actually belonged to Frank Costello.

Now, any argument here, the speculation, that Mrs. Costello had this hoard of cash, $350,000 on hand before October 1937, is ridiculous. If there was anything to it, all the defense would have to do is call a credible witness to that witness stand to testify to it.

Ladies and gentlemen, I suggest to you that that argument is an insult to your intelligence.

Now, what about the other aspect of this crime? His Honor will charge you that the Government must show that this evasion was wilful. You see what I have in my (2329) hand here. These are checks, ordinary garden variety checks. You and I use them every day. They are easy to send through the mail. They protect against theft and they make a record of payment. They show on whose account the money was drawn; they show to whom it was paid, and the endorsements on the back show where the money was deposited or where it was spent. These are the accustomed mode of payment in this day and age. And Frank Costello knows that.

But there is one other thing about these little slips of paper. They are the most important leads that you can find when you come to investigate income tax evasion. And without them it is almost impossible to prove fraudulent concealment of income. And Costello knows that. He knows that these checks are used for payment and that they make good records. That is how these checks came into existence. There is $22,000 worth of checks here.

But the strange thing about these checks that I am holding in my hand is that you won't find Costello's name any place on any one of them. They are signed by George Wolf. Costello knew that if his name was on these checks it would be easy to prove that he invested $22,000 in Consolidated Television. You don't have Wolf making these checks just for Costello's convenience. (2330) Costello had a bank account right around the corner from his home. Why didn't he use it? Instead of that he walked, he goes all the way down to 30 Broad Street three times to deliver $22,000 in cash.

Then there was another significant thing about this Consolidated Television. You will remember that Wolf testified that half this investment was withdrawn and that he got a check from Consolidated Television for $11,000; Costello told him to cash the check and give the cash to Costello. Why? Can there be any other reason than the fact

that Costello wanted to conceal the investment in that company; that none of these checks would lead to him?

And then there was another $5,000 loaned in this Consolidated Television thing, and again it is Wolf's check, not Costello's.

Look at the way he avoids using his bank account where records are made and where you can trace and find his expenditures and his investments.

How many others are there made like this where there is no record to show it? Where the cash is delivered and the checks are in someone else's name? We'll never know.

Costello knows that records can be very helpful if you want to establish something, but he knows how to (2331) avoid making them when you don't want anything to show.

Look at the deposits in his own bank account, every single one of them by check. In those deposits you will find all the income he received per these books, and his income very neatly agrees with it. There's a record in the bank. He wants to establish that. You will find in his bank account the checks from George Morton Levy that he got for keeping bookmakers off the track. There is a record there.

You won't find any checks from "miscellaneous" in that bank account, or any identifiable deposit that in any way matches that income miscellaneous that was kept on slips of paper, that he didn't even show to George Wolf, his own lawyer, when he made out his income tax return. Isn't it obvious that he was concealing his income, and doing so deliberately?

Costello knows that when you want to dress up your income tax return, checks make very good records. He even had special checks for his charity accounts, deductions. He wanted to establish that record. And don't be fooled by it, ladies and gentlemen. It is a built-in sympathy argument in the defense to this case. If you will look at

those charities, you will see that they are designed to hit right at a New York jury and the people who sit on New York juries. And (2332) they were intended for just the very purpose that they have been used in this case.

But, now, ladies and gentlemen, just because you give a few thousand dollars to charity, that doesn't give you a license to cheat and defraud your Government out of income taxes that you owe. And bear in mind that in computing this tax, we've given Costello the deduction for every single one of those contributions that we can trace to his name. Those funds were commingled and we had to separate them out so that we wouldn't be charging him with any greater expenditure than was actually his. And that is why we went through the long process of separating out what was actually his money from money he had collected from others, simply so that we wouldn't be charging him with greater expenditures than were actually his, and to give him the benefit of every doubt.

Don't be confused here by the other items of deduction that Costello didn't take on his income tax returns. There were plenty of good reasons why he didn't take them.

Let us look at the sales tax, for example. If he took those sales taxes as the deduction on his income tax returns he would expose every single one of these expenditures, and he would be spending more money, (2333) far more money, than he is reporting on his income tax return, and when the revenue agent examined that return, he would see that, and he would find the fraud. That is why he didn't take that deduction.

And he didn't claim any deduction for his safe deposit box for the same reason, he didn't want to reveal that he had one.

And then there was $25,000, ten thousand of it in 1946 and fifteen thousand of it in 1947, that he spent to a law firm of Greenbaum, Wolff & Ernst, for tax advice. Those deductions were not taken. They were plainly allowable by law. Why didn't he take them? Because it would show that

he had that other $10,000 in 1946 as income, and it would show that he had it in 1947, another $15,000, income. That is why he didn't take them. And don't be fooled by that fact.

There is another one here, so-called over-payments of his taxes. Don't be fooled by that. He paid taxes on what he reported, not on what he did not report. Those are what he claimed were overpayments not what, in fact, were overpayments.

When he signed that tax return, he did the same thing you and I did, he certified under penalties of perjury that it was true, and the Government had a right to rely on that, just the same as it does with (2334) you or with me. Did the Government make him call a hundred and fifty witnesses in a courtroom to prove that he was entitled to that refund? No, it took his word. It relied on what he said, and it was entitled to do that.

And those so-called overpayments were calculated to mislead the Tax Collector and confuse you and fool you, and I don't think you are going to fall for it.

There is another good example of how Costello knows that checks make very good records when you want. Look at those Erickson loans, $25,000 in 1946 and $25,000 in 1949. Every single payment of principal or interest on those loans is made by check. Why? Because that is not taxable income, if you believe that those loans were ever made, and he wanted to establish that for use on this very trial. And he was thinking about it way back there in 1946.

Look at how elaborate that loan is set up: Formal notes, formal receipts, an elaborate exchange of correspondence, documented step by step. Yes, Costello knows that records can be made. He knows how to make them when he wants them.

Bear in mind there has been no witness here to testify one penny of that money ever was paid to Costello (2335) by Erickson; and if you don't believe those loans, there is $25,000 more income in 1946 and $25,000 more in 1949; and

look at them, ladies and gentlemen, and ask yourself, "Isn't this just a bit too perfect?"

Once again we have got an example of how Costello knows how to make records when he wants them. Look at that Crescent Music Company partnership. Very elaborate and written agreement but, as I pointed out before, it is the only one you have seen in this whole case.

He knows that these records are useful when he wants to show something but he knows how to avoid making them, when it shows concealment of his income, and he did it time and time again in this case.

That is the reason the deed in Florida was taken in somebody else's name. You had to make a public record there. You had to record that deed. That is why it was in somebody else's name. That is why he did all this business in cash. He wanted to hide how much money he was receiving and how much he was spending. That is why he gave George Wolf $53,000 in cash in fifty and hundred dollar bills.

Do you go around making investments in cash, $53,000 worth of them? Does anyone else who is being honest on their tax returns do that? There is only (2336) one reason for all this cash and that is to wilfully evade these taxes, to conceal it.

He gave Wolf $9,500 in cash on that tax lien. He gave him another $7,000 in cash to pay back some old judgments. He paid Wolf $13,000 in cash for legal fees. And he avoided, by using cash, the making of the usual records of payment.

Look at the length to which he was willing to go to conceal how much income he had: Even when it came to building a mausoleum, all in cash, $18,000 worth of it. And the record? The record is in the name of Amilcare Festa, not Frank Costello, and if you cannot find Amilcare Festa, or if he won't come into court and testify, how in the world

are you ever going to prove that Costello spent the $18,000? And Costello knows that. That was an innocent transaction.

There is only one reason for dealing in cash. There cannot be any other, and that is to cheat and defraud the Government of the United States, the same Government that gives him the opportunity to make this money, and to ride around in his Cadillac, and to have his two homes, and to have two maids. Can you sink any lower than that?

And look at the way he concealed his income from gambling with that great big word "miscellaneous." (2337) Do you put "miscellaneous" on your income tax return? You wouldn't dare. Neither would I nor anyone else.

We could not look an honest taxpayer in the eye if we let him get away with this.

When he buys the property, he puts it in Wolf's name, Consolidated Television, the property in the Geigerman's name, businesses in his wife's name, all of that. The only purpose for that is to conceal his true income.

Even with a hundred and fifty witnesses and three hundred and fifty exhibits the Government has been extremely lucky to be able to prove this man's expenditures and income after the way he has handled his transactions to conceal and hide the truth. For years he has tried to keep this evidence from you and from a courtroom. It has taken years of investigation to catch him, and now we have got him, ladies and gentlemen. That evidence has been presented in this courtroom and it proves that he evaded this tax.

Maybe I have talked too long, but if I have, I have done so out of zeal for my client, the United States of America and 160 million people who look to our courts of law for the fulfillment of their sense of justice or for the utter shattering of their confidence in our institutions.

(2338) If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country will

break their backs carrying the load for these easy money Costellos.

In short, ladies and gentlemen, the question for you to decide is whether it pays to cheat and defraud your Government out of income taxes, and I think that is a question we can safely leave in your hands.

I ask you to return a verdict of guilty on all counts as charged.

I thank you.

* * * * * * * * * * *

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of April one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK, *Chief Judge*,
HON. LEARNED HAND, *Circuit Judge*,
HON. JEROME N. FRANK, *Circuit Judge*.

UNITED STATES, *Plaintiff-Appellee*,

v.

FRANK COSTELLO, *Defendant-Appellant*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that on the second count the judgment of said District Court be and it hereby is reversed; and on the third and fourth counts said judgment be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

A. DANIEL FUSARO
Clerk

A true copy,

/s/ A. DANIEL FUSARO
Clerk

Exhibit # 11
5-23-61

[fol. 126]

In United States Court of Appeals

For the Second Circuit

No. 81—October Term, 1962

Argued November 9, 1962

Docket No. 27597

Frank Costello, Petitioner,

v.

Immigration and Naturalization Service, Respondent.

Before: Medina, Smith and Kaufman, Circuit Judges.

Petition, pursuant to 8 U. S. C. Section 1105(a)(1), to review an order of deportation sustained by the Board of Immigration Appeals. Petition dismissed.

Edward Bennett Williams, Washington, D. C. (Harold Ungar, Washington, D. C., on the brief), for petitioner.

Roy Babitt, Special Assistant United States Attorney, New York, N. Y. (Vincent L. Broderick, United States Attorney for the Southern District of New York, New York, N. Y., on the brief), for respondent.

[fol. 127] Opinion—December 4, 1962

Medina, Circuit Judge:

Frank Costello, an alien, entered the United States from Italy in 1895; he became a naturalized citizen in 1925; he was convicted in 1954 of income tax evasion for the years 1948 and 1949, under two counts of a single indictment that

contained no conspiracy charge, *United States* v. *Costello*, 2 Cir., 1955, 221 F. 2d 668, affirmed, 1956, 350 U. S. 359; and in 1959 his naturalization was revoked. *United States* v. *Costello*, 2 Cir., 1960, 275 F. 2d 355, affirmed, 1961, 365 U. S. 265. Deportation proceedings based upon the two convictions resulted in the order of deportation now sought to be reviewed under 8 U. S. C. Section 1105(a)(1), after an unsuccessful appeal to the Board of Immigration Appeals.

The controlling statute is Section 241(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1251 (a), the pertinent provisions of which follow:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; * * *.

Costello's contentions are: (1) that the statute was not intended to apply to a person of naturalized status at the time of the convictions; (2) that the Government failed to establish conviction of two crimes "not arising out of a single scheme of criminal misconduct"; (3) that convictions of tax evasion did not constitute convictions of crimes [fol. 128] involving moral turpitude; and (4) that it was prejudicial error not to issue a subpoena to the lawyer who represented Costello at the criminal trial for tax evasion, and who allegedly would have testified to the effect that the two convictions did arise "out of a single scheme of criminal misconduct."

We find no merit in any of these contentions and dismiss the petition.

I

After several years of intensive study the Congress passed the Immigration and Nationality Act of 1952, and it became law. One of the specific objectives of this legis-

lation, largely in response to recommendations by the Senate Special Committee to Investigate Organized Crime in Interstate Commerce,[1] was to broaden the provisions governing deportation, "particularly those referring to criminal and subversive aliens."[2]

As the construction of the statute relied upon by Costello would frustrate the general legislative purpose just referred to, and in effect grant immunity, during the period between the granting and the revocation of naturalization, to those who fraudulently obtained the status of citizens, it would seem to require at least a fairly persuasive argument to induce us to interpret the statute in such fashion as to require, as a prerequisite to deportation in the case of a denaturalized person, two convictions of crime either prior to his naturalization, or subsequent to the revocation thereof for fraud. In other words, despite the fact that the person sought to be deported has not only been twice [fol. 129] convicted of crime, but also has obtained citizenship status by fraud, we are told that by some mischance the statute has been so worded as to leave a loophole through which Costello may avoid deportation.

When the various integral parts of the statute are read together, as they must be, it is not surprising to find that no such loophole exists. There is no ambiguity, and no occasion to apply the rule of *Fong Haw Tan* v. *Phelan*, 1948, 333 U. S. 6, to the general effect that doubts are to be resolved in favor of the deportee.[3]

Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, in his Commentary on the 1952 Act, *supra*, 8 U. S. C. at page 18, states: "Section 1101 dealing with definitions is to be regarded as probably

---

[1] House Report No. 1365, 82nd Cong., 2nd Sess. (1952), p. 28.

[2] *Commentary on the Immigration and Nationality Act*, Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, 8 U. S. C., Part I, p. 61.

[3] The doubt thus resolved in *Fong Haw Tan* concerned the meaning of the words "sentenced more than once," various Courts of Appeals in several Circuits having given this phrase different and conflicting constructions.

the most important, truly pivotal segment of the statute." See also House Report No. 1365, *supra*, page 31. 8 U. S. C. Section 1101(a)(3), Section 101(a)(3) of the Act, defines an "alien" as "any person not a citizen or national of the United States." Accordingly, as the statute speaks in terms of the time of enforcement, when Section 241(a)(4), 8 U. S. C. Section 1251(a)(4), directs that any "alien * * * shall * * * be deported who * * * at any time after entry is convicted of two crimes involving moral turpitude," there is no room for interpretation or construction. At the time the proceedings for deportation were commenced Costello was a person not a citizen or national of the United States and the date of his two convictions is at a time after his entry into the United States. In the context of the statute the word "is" appears to us to be the most comprehensive word that could have been used, just as is the case with the [fol. 130] phrase "at any time after entry."[4] See Sutherland, Statutory Construction, 3rd Ed., 1943, Section 4930.

Far from supporting Costello's argument on this point, *Eichenlaub* v. *Shaughnessy*, 1950, 338 U. S. 521, strongly supports the Government view of the meaning of Section 241(a), 8 U. S. C. Section 1251(a). There "all aliens who since August 1, 1914, have been or may hereafter be convicted", of violations of the Espionage Act of 1917, as amended, were made deportable, provided the Attorney General after a hearing found them to be undesirable residents of the United States. Thus the time of conviction is stated to be, as paraphrased by the Supreme Court, at page 530, "since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920," when the statute under con-

---

[4] Costello's contention that the use of the word "is" requires that alienage and the deportable crimes be simultaneous rests too much upon this single word of the statute and gives the language of the statute a meaning contrary to its natural tenor. Indeed, the Supreme Court has paraphrased this section as providing for "the deportation of an alien who 'at any time after entry' has been convicted of two crimes involving moral turpitude." *Lehmann* v. *United States, ex rel. Carson*, 1957, 353 U. S. 685, 689, rehearing denied, 354 U. S. 944.

sideration became effective. In Section 241(a), 8 U. S. C. Section 1251(a), before us now, the time of the convictions is stated to be "at any time after entry." What the Supreme Court decided was precisely the point now raised by Costello, and it was decided against the deportee. *Eichenlaub* had fraudulently procured his naturalization, and the revocation or cancellation of his certificate of citizenship took place after his conviction. So he argued that he was not an alien when convicted and that the statute was not applicable, as it did not in terms include an alien who was not an alien at the time of his conviction. This was supposed to be at least an ambiguity to be resolved in favor of the deportee. Despite a strong dissent by Mr. Justice [fol. 131] Frankfurter on the basis of this identical argument, the Supreme Court found no ambiguity, and held, at page 530:

> A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized.

So here, the language of the statute is all inclusive, there are no exceptions. And, to paraphrase the comment in *Eichenlaub*, at pages 530-1, it is difficult to imagine a reason for the Congress to provide for the deportation of an alien, convicted of two crimes involving moral turpitude, who had never been naturalized, but to prohibit the deportation of an alien who had not only been convicted of two crimes involving moral turpitude, but had in addition fraudulently secured a certificate of citizenship. Such a distinction simply does not make sense.

The Congress, in the formulation of the provisions of the 1952 Act, desired to merge all existing statutes, judicial decisions, and administrative interpretations into a single, comprehensive, completely revised immigration and

nationality code.[5] There is internal as well as external evidence that those who drafted this code were aware of the decisions of the Supreme Court and of other courts relevant to their task, including *Eichenlaub*.[6]

[fol. 132] The cases relating to allegedly analogous situations, relied upon by Costello are all distinguishable. For purposes of reference, we have collected them in a footnote,[7] but think to discuss them in detail would carry us too far afield. Moreover, we express no opinion relative to the validity and persuasiveness of the reasoning upon which these decisions are based.

A subsidiary point made by Costello on this phase of the case is that he could not fairly be considered to be an alien convicted of two crimes involving moral turpitude, within the meaning of Section 241(a), 8 U. S. C. Section 1251(a), as such a construction would, as to him, render meaningless and nugatory the provisions of Section 241(b)(2), 8 U. S. C. Section 1251(b) to the effect that Section 241(a), 8 U. S. C. Section 1251(a), shall not apply "if the court sentencing such alien for such crime shall make • • • a recommendation to the Attorney General that such alien not be deported."

It is a sufficient answer to this contention, we think, to say that any rights arising out of Section 241(b), 8 U. S. C. Section 1251(b), were waived by Costello as he had secured his naturalization by fraud. Moreover, Costello is chargeable with knowledge that he had procured his naturalization by fraud, and that deportation proceedings might well follow his conviction on any two of the counts in the indictment for tax evasion. There was thus nothing to prevent his asking the sentencing court for a recommendation to

---

[5] Sen. Report No. 1515, 81st Cong., 2nd Sess. (1950), pp. 1-4; Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, 82nd Cong., 1st Sess. (1951), pp. 1-4; House Report No. 1365, *supra*, pp. 27-28.

[6] Sen. Report No. 1515, *supra*, pp. 390-2; Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, *supra*, p. 694.

[7] *Mangaoang* v. *Boyd*, 9 Cir., 1953, 205 F. 2d 553, cert. denied, 346 U. S. 876; *Gubbels* v. *Hoy*, 9 Cir., 1958, 261 F. 2d 952; *Resurreccion-Talavera* v. *Barber*, 9 Cir., 1956, 231 F. 2d 524.

the Attorney General that he be not deported. In any event, there is no inherent right to the limited privilege afforded by Section 241(b), 8 U. S. C. Section 1251(b). Basically, of course, we come back to the comment in the opinion of the Supreme Court in *Eichenlaub* above referred [fol. 133] to. It is nothing short of absurd to suppose that the Congress intended to favor the alien who, over and above his convictions for crimes involving moral turpitude, had been sufficiently clever and unscrupulous to have defrauded the Government into providing him with the protection of a certificate of citizenship.

II

Did the two crimes of income tax evasion arise "out of a single scheme of criminal misconduct"? Costello says they do; we think they do not.

The only evidence relevant to this issue is the record of the convictions, offered by the Government. Costello did not testify. The application for a subpoena to procure the testimony of the lawyer who represented Costello at the criminal trial was properly denied. Any summary by this lawyer of the evidence adduced at the trial or interpretations and speculation by him under the guise of testimony concerning the significance of such evidence or of the maneuvers of counsel would have plainly been completely devoid of probative force. If it was thought that specific portions of the trial transcript or indeed the whole thereof was admissible, the trial transcript or parts thereof, with or without the exhibits received in evidence, should have been offered by Costello at the hearing. No such offer was made; and no ruling admitting or excluding such proof is before us for consideration; so we shall not comment further on this peripheral, so-called procedural point. It has no merit whatever.

Before we address ourselves to the phrase "single scheme of criminal misconduct," it is essential that we have before us a brief description of what the record shows as well as what it does not show. We have already observed that the indictment contains no conspiracy count.

[fol. 134] The judgment of conviction under date of May 17, 1954 "adjudged" Costello guilty "of the offense of wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife for the years 1947-1948-1949, by filing false and fraudulent joint income tax returns," in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. (1940 ed.) Section 145(b). We reversed as to the year 1947, and affirmed the conviction of attempting to evade income taxes for the years 1948 and 1949, *United States* v. *Costello*, 2 Cir., 1955, 221 F. 2d 668; and the Supreme Court affirmed, 1956, 350 U. S. 359. The prosecution proved its case against Costello by the "net-worth method."

Indubitably the two crimes charged in the counts relative to the years 1948 and 1949 are two separate and distinct crimes. *Myres* v. *United States*, 8 Cir., 1949, 174 F. 2d 329, 334, cert. denied, 338 U. S. 849; *United States* v. *Johnson*, 7 Cir., 1941, 123 F. 2d 111, 119, rev'd. on other grounds, 1943, 319 U. S. 503; *United States* v. *Sullivan*, 2 Cir., 1938, 98 F. 2d 79, 80. The acts constituting the commission of these two crimes are separated by a substantial interval of time. In the absence of additional facts to support an inference that the two crimes are related we think the Special Inquiry Officer was required to find, as he did, that Costello had been convicted of two crimes "not arising out of a single scheme of criminal misconduct." This is enough to dispose of this phase of the case, and it appears to be the reasoning adopted by the First and Ninth Circuits. *Chanan Din Khan* v. *Barber*, 9 Cir., 1958, 253 F. 2d 547, 549, cert. denied, 357 U. S. 920; *Fitzgerald ex rel. Miceli* v. *Landon*, 1 Cir., 1956, 238 F. 2d 864, 867.

Concededly Costello, when he filed his joint income tax return for the year 1948, was under a definite obligation to file an accurate and truthful return disclosing his income [fol. 135] and that of his wife for that year. With respect to that year the only scheme of criminal misconduct discernible in this record is the single scheme to evade the payment to the Government of the income taxes justly due and payable for that year by filing a false and inaccurate return. Similarly, when he filed his income tax return for the year

1949, he was under a definite obligation to file an accurate and truthful return disclosing his income and that of his wife for that year. Here again the only scheme of criminal misconduct discernible in this record is the single scheme to evade the payment of the income taxes justly due and payable for the year 1949. There is no connection whatever between the two. A finding that the two convictions were of crimes "arising out of a single scheme of criminal misconduct" would not only have been clearly erroneous, it would have been without a scintilla of evidentiary support. Moreover, the circumstance that the Government proved its case against Costello by the "net-worth method" is wholly immaterial.

Much as we are tempted to discuss the theories advanced in a number of decisions by various courts with respect to the meaning of the phrase "single scheme of criminal misconduct," we think the exercise of a proper judicial restraint makes it undesirable for us to reach out and now decide more than the circumstances of this case require us to decide. We would not wish, however, to be thought to subscribe to the views expressed in the cases collected in footnote [8]. The statute makes no reference whatever to any "common scheme or plan"; nor would it seem reasonable to suppose that the Congress intended to grant immunity from deportation to those who over a period of [fol. 136] time pursued a course of criminal misconduct, involving numerous successive, separate crimes, consummated at different times but in the same manner, or with the same associates, or even by the use of the same fraudulent devices, disguises, tools or weapons. Nor, in the case of successive bank robberies at different times and places, for example, would it seem that these could be said to have arisen out of a single rather than two separate schemes of criminal misconduct, simply because the robbers, prior to the first robbery, had in mind and had discussed the robbery of the second bank after the hue and cry over the first robbery

[8] *Jeronimo* v. *Murff*, S. D. N. Y., 1957, 157 F. Supp. 898, 813; *Zito* v. *Moutal*, D. C. Ill., 1959, 174 F. Supp. 531, 535; *Barrese* v. *Ryan*, D. C. Conn., 1962, 203 F. Supp. 880, 884. See also *Wood* v. *Hoy*, 9 Cir., 1959, 266 F. 2d 825, 829.

had subsided. After all there is no denying the fact that the Congress by the 1952 Act intended to make it easier rather than more difficult to deport aliens who were recurrent criminals. But this is by the way.

III

The contention that crimes of income tax evasion do not involve moral turpitude need not long detain us. Costello's brief leads us into a labyrinth of technical rulings in a great variety of supposedly analogous situations. But the plain fact remains that Costello was charged with the offenses of "wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife" for the years 1948 and 1949, by the filing of "false and fraudulent returns," and he was adjudged guilty as charged. The statute pursuant to the terms of which Costello was twice convicted, is as above stated Section 145(b) of the Internal Revenue Code of 1939. The crimes consist of "wilfully" attempting in any manner to evade or defeat any tax imposed by the Act of which Section 145(b) is a part. There can be no "wilful" evasion without a specific intent to defraud. *United States* v. *Martell*, 3 Cir., 1952, 199 F. 2d 670. Accordingly, we hold [fol. 136a] the two convictions are of crimes involving moral turpitude. *Jordan* v. *De George*, 1951, 341 U. S. 223. An alien who is permitted to enter this country and to enjoy the blessings of freedom under the Constitution and laws of the United States, and who wilfully evades or attempts to evade the payment of his fair share of the taxes needed to support our Government is surely engaged in conduct involving moral turpitude.

Petition dismissed.

[fol. 137]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of December, one thousand nine hundred and sixty-two.

Present: Hon. Harold R. Medina, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Circuit Judges.

FRANK COSTELLO, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

JUDGMENT—December 4, 1962

A petition for review of an order of the Immigration and Naturalization Service.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed that the petition be and it hereby is dismissed.

A. Daniel Fusaro, Clerk.

[fol. 138] [File endorsement omitted]

[fol. 139] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 140]

SUPREME COURT OF THE UNITED STATES

No. 882—October Term, 1962

FRANK COSTELLO, Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE.

ORDER ALLOWING CERTIORARI—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to Question 1 presented by the petition which reads as follows:

"Whether the provision of § 241 (a) (4) of the Immigration and Nationality Act of 1952 for deportation of an 'alien . . . who at any time after entry is convicted of two crimes' applies to an individual who was a naturalized citizen when convicted."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlan took no part in the consideration or decision of this petition.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
1000 Hill Building
Washington 6, D. C.
Counsel for petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

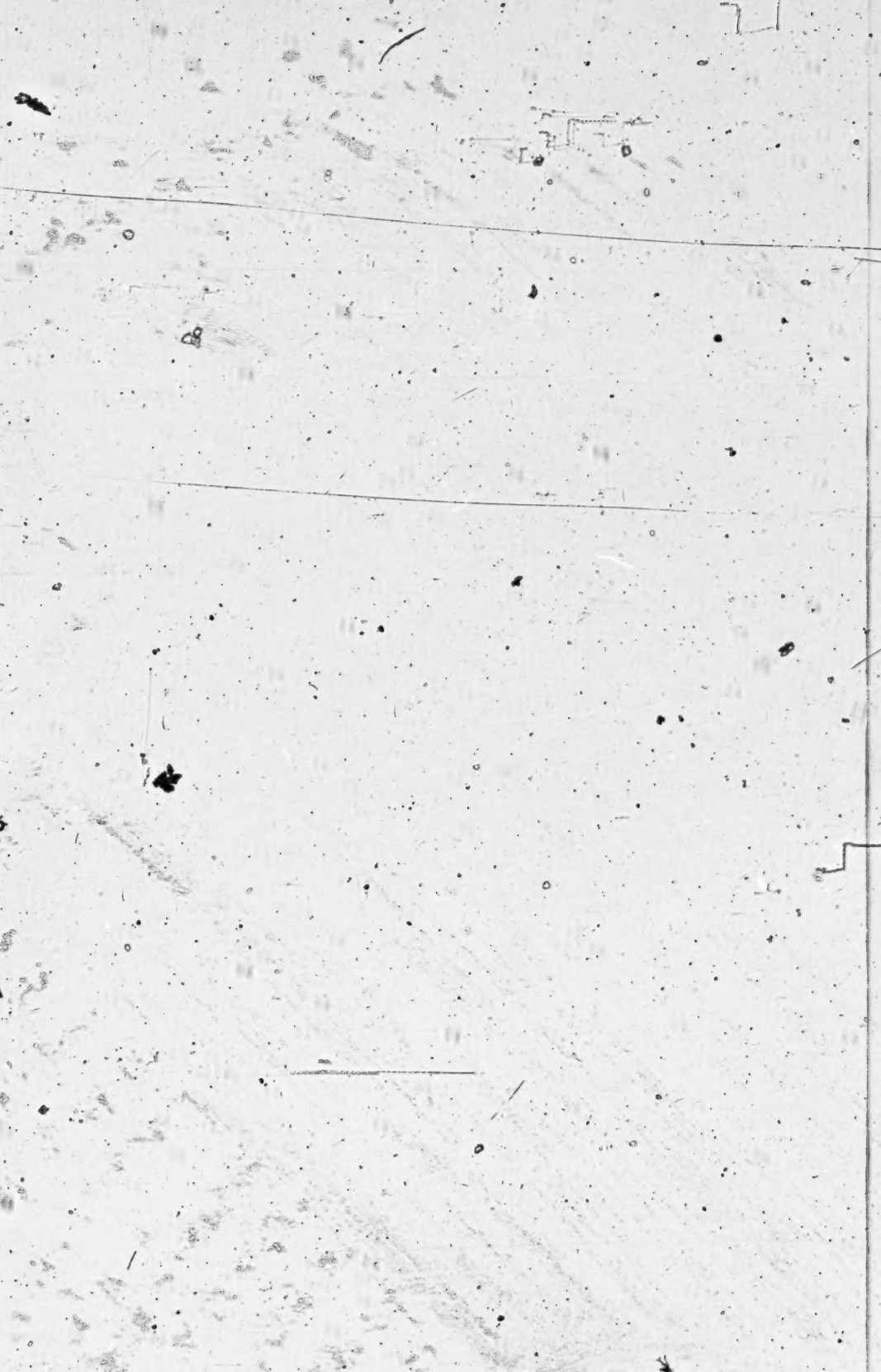

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	27
Appendices:	
Appendix A:	
Immigration and Nationality Act of 1952, § 241(a)(4), (b), 8 U.S.C. § 1251(a)(4), (b)	1a
Appendix B:	
Decision and Order of Special Inquiry Officer, June 21, 1961	2a
Decision and Order of Board of Immigration Appeals, January 2, 1962	23a
Opinion of the United States Court of Appeals for the Second Circuit	48a
Appendix C:	
Sawkow v. *Immigration and Naturalization Service*, United States Court of Appeals for the Third Circuit, No. 14,048, decided January 29, 1963	59a

TABLE OF AUTHORITIES

CASES:

Barrese v. *Ryan*, 203 F. Supp. 880 (D. Conn. 1962) 16, 25

Brancato, United States ex rel. v. *Lehmann*, 239 F. 2d 663 (6th Cir. 1956) 5, 6, 9

Page

Chanan Din Khan v. *Barber*, 143 F. Supp. 771 (N.D. Cal. 1957) 13, 14
Chanan Din Khan v. *Barber*, 253 F. 2d 547 (9th Cir. 1958), *cert. denied*, 357 U. S. 920 ..... 14, 16, 18, 19, 22, 23
Costello v. *United States*, 365 U.S. 265 3
Eichenlaub, United States ex rel. v. *Shaughnessy*, 338 U. S. 521 ..... 5, 6, 7, 9, 10, 11
F— G— and C— D—, Matter of, 8 I. & N. Dec. 447 (1959) 17, 18
Fong Haw Tan v. *Phelan*, 333 U. S. 6 ..... 6, 7, 10, 12, 13, 14, 17, 19
Gubbels v. *Hoy*, 261 F. 2d 952 (9th Cir. 1958) 11
Helvering v. *Mitchell*, 303 U. S. 391 26
Holland v. *United States*, 348 U. S. 121 ..... 20, 21, 22
Jeronimo v. *Murff*, 157 F. Supp. 808 (S.D. N.Y. 1957) 14, 15, 16, 17
Jordan v. *De George*, 341 U. S. 223 ..... 25, 27
Mangaoang v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U. S. 876 ..... 6, 8, 9, 10, 11
Miceli, Fitzgerald ex rel. v. *Landon*, 238 F. 2d 864 (1st Cir. 1956) 13, 16, 18
Resurreccion-Talavera v. *Barber*, 231 F. 2d 524 (9th Cir. 1956) 9, 11
S—, Matter of, 5 I. & N. Dec. 678 (1954) 6, 10
Sawkow v. *Immigration and Naturalization Service*. United States Court of Appeals for the Third Circuit, No. 14,048, decided January 29, 1963 ..... 17, 23
United States v. *Carrollo*, 30 F. Supp. 3 (W.D. Mo. 1939) 27
United States v. *Costello*, 221 F. 2d 668 (2nd Cir. 1955), affirmed, 350 U.S. 359 ..... 3, 20
United States v. *Costello*, 275 F. 2d 355 (2nd Cir. 1960) 3
United States v. *Scharton*, 285 U. S. 518 ..... 25, 26
United States v. *Stephan*, 50 F. Supp. 445 (E.D. Mich. 1943) 12
United States v. *Sullivan*, 98 F. 2d 79 (2nd Cir. 1938) 18
Wood v. *Hoy*, 266 F. 2d 825 (9th Cir. 1959) 13, 16, 17, 19, 23
Zito v. *Mautal*, 174 F. Supp, 531 (N.D. Ill. 1959) ... 15, 16, 17, 23

STATUTES: Page

Immigration and Nationality Act of 1952, 66 Stat. 204, as amended:

§ 212(a)(9), 8 U.S.C. § 1182(a)(9) 7, 10
§ 241(a)(4), 8 U.S.C. § 1251(a)(4) 3, 4, 5, 7, 9, 11, 12, 19, 21, 25
§ 241(a)(7), 8 U.S.C. § 1251(a)(7) 8
§ 241(a)(11), 8 U.S.C. § 1251(a)(11) 8
§ 241(a)(12), 8 U.S.C. §1251(a)(12) 8
§ 241(a)(15), 8 U.S.C. § 1251(a)(15) 8
§ 241(a)(16), 8 U.S.C. § 1251(a)(16) 8
§ 241(b), 8 U.S.C. § 1251(b) 3, 11

Immigration Act of 1917, § 19(a) 12
Internal Revenue Code of 1954, § 6531 26
Internal Revenue Code of 1939, § 145(b) 25
Internal Security Act of 1950, § 22, 64 Stat. 1006 9
Revenue Act of 1926, § 1114(b), 44 Stat. 116 25
Act of June 6, 1932, c. 209, § 1108, 47 Stat. 288 26
5 U.S.C. § 1040 2
8 U.S.C. § 1105a (1961 Supp.) 2
28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

Auerbach, Immigration Laws of the United States (2d ed., 1961) 13
Conference Rep. No. 2096, 82nd Cong., 2d Sess. (1952) 13
H.R. Rep. No. 1492, 72nd Cong., 1st Sess. (1932) 26
H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952) 13
Regulations of the Immigration and Naturalization Service, § 287.4(a), 8 C.F.R. § 287.4(a) 23
S. Rep. No. 1137, 82nd Cong., 2d Sess. (1952) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank Costello prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered December 4, 1962, dismissing his petition to review an order for his deportation.

OPINIONS BELOW

The June 21, 1961 decision and order of the Special Inquiry Officer of the Immigration and Naturalization Service directing petitioner's deportation, the January 2, 1962 decision and order of the Board of Immigration

Appeals dismissing petitioner's appeal, and the opinion of the Court of Appeals for the Second Circuit (not yet reported) dismissing petitioner's petition for review are printed in Appendix B hereto, *infra*, pp. 2a, 23a and 48a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1962. R. 137. The jurisdiction of this Court is invoked under 8 U.S.C. § 1105a (1961 Supp.), 5 U.S.C. § 1040 and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of § 241(a)(4) of the Immigration and Nationality Act of 1952 for deportation of an "alien . . . who at any time after entry is convicted of two crimes" applies to an individual who was a naturalized citizen when convicted.

2. Whether conviction of two counts of attempted income tax evasion for two successive years, in a prosecution based on the net worth-expenditures method, is conviction of "two crimes . . . not arising out of a single scheme of criminal misconduct" within the meaning of § 241(a)(4).

3. Whether the burden of proof on the issue of singleness of scheme may be imposed upon the alien sought to be deported.

4. If the alien has any burden of proof on the issue of singleness of scheme, whether considerations of due process permit denying him a subpoena to obtain the testimony on that issue of the attorney who defended him at his tax evasion trial.

5. Whether the conviction described in Question 2 *supra* is conviction of "two crimes involving moral turpitude . . . ."

STATUTE INVOLVED

The statutory provisions involved are Section 241 (a)(4), (b) of the Immigration and Nationality Act of 1952, 66 Stat. 204, as amended, 8 U.S.C. § 1251(a)(4), (b). They are printed in Appendix A, *infra*, p. 1a.

STATEMENT

Petitioner, born in Italy on January 26, 1891, was brought to the United States when he was four years old. He has resided here for almost sixty-eight years, his only absence from this country since his original entry being a short visit to Mexico in 1948. Petitioner is married to a United States citizen. On September 10, 1925, he became a naturalized citizen by order of the United States District Court for the Southern District of New York. R. 43, 66.

In 1954 petitioner was convicted of separate counts of attempting to defeat and evade income taxes for the years 1948 and 1949.[1] R. 48. His naturalization was cancelled by order of the United States District Court for the Southern District of New York on March 9, 1959 (R. 43), which order was subsequently affirmed by the Court of Appeals for the Second Circuit[2] and, on February 20, 1961, by this Court.[3] Thereupon re-

[1] The original conviction was on three counts, for the years 1947 through 1949. On appeal the conviction on the 1947 count was reversed and the other two affirmed. *United States* v. *Costello*, 221 F. 2d 668 (2nd Cir. 1955), *affirmed*, 350 U.S. 359.

[2] *United States* v. *Costello*, 275 F. 2d 355 (2nd Cir. 1960).

[3] *Costello* v. *United States*, 365 U.S. 265.

spondent instituted the deportation proceedings giving rise to this petition.

The deportation proceedings commenced with service of appropriate papers upon petitioner on March 31, 1961, while he was serving his tax evasion sentence at Atlanta Penitentiary. R. 2-8. After a hearing at the penitentiary, respondent's Special Inquiry Officer ordered petitioner deported as an "alien . . . who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . .", under the second part of § 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(4).[4] R. 61-62. The two crimes in question were the two counts of attempted tax evasion.[5] In the course of the hearing, petitioner applied for a subpoena calling the attorney who had defended him at his tax evasion trial, the witness being claimed to have knowledge of facts showing the successive-year evasions to have arisen out a single scheme

---

[4] Hereinafter referred to as "§ 241(a)(4)".

[5] The government had urged two additional "crimes involving moral turpitude" in support of this ground of deportability—petitioner's 1952 contempt of Congress conviction and his 30-day imprisonment in 1957 by order of the Court of General Sessions of New York County for refusing to answer certain questions of a grand jury. R. 7-9. The Special Inquiry Officer, however, sustained petitioner's contentions that the contempt of Congress conviction did not involve moral turpitude and that the 1957 adjudication of contempt of court was not a conviction of a crime. R. 44-48.

As an independent ground of deportability, the government, relying on the first part of § 241(a)(4), contended that the tax evasions and the contempt of Congress were crimes "committed within five years after entry," the "entry" being petitioner's return from his visit to Mexico in 1948. R. 7. The Special Inquiry Officer rejected this ground of deportability because petitioner's 1948 return from Mexico was not an "entry" within the meaning of § 241(a)(4), since petitioner was then a citizen. R. 53-54.

of criminal misconduct. The application was denied without statement of any reason. R. 32-38.

From the order of deportation, petitioner duly appealed to the Board of Immigration Appeals (R. 63), which, on January 2, 1962, dismissed the appeal. R. 65. Petitioner then filed his petition for review in the court below. R. 92. On December 4, 1962, the court dismissed the petition (R. 138), holding:

> (1) that § 241(a)(4), providing for deportation of any "alien . . . who . . . is convicted", applies to one who was a naturalized citizen when convicted;
>
> (2) that petitioner's successive-year tax violations were two crimes "not arising out of a single scheme of criminal misconduct";
>
> (3) that the two violations were crimes "involving moral turpitude"; and
>
> (4) that the denial of petitioner's application for a subpoena was proper. R. 126-36.

REASONS FOR GRANTING THE WRIT

1. The initial question is whether petitioner, now an alien through denaturalization, may be deported for convictions which occurred while he was a citizen. "Because of the importance of the issue to American citizenship," this Court reviewed the question in a much narrower context,[6] in *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 527. The statute there involved authorized deportation of "aliens who since August 1, 1914 have been or may

[6] See *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666 (6th Cir. 1956).

hereafter be convicted of" certain espionage violations.[7] The instant statute obviously creates a much broader base of deportability—any crimes involving moral turpitude, rather than the specific espionage violations involved in the *Eichenlaub* statute. The importance of the issue to American citizenship is, therefore, greater here than in *Eichenlaub*. It is submitted that the Court should review the issue in the instant case because, as hereinafter shown, (a) the four-three decision in *Eichenlaub*, being based on the specific wording of the statute there involved (338 U.S. at 529-30), left the broad issue essentially unresolved; and (b) the decision below misapplies *Eichenlaub* in such a manner as to ignore the rule of construction announced in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, and to conflict in principle with the Ninth Circuit's decision in *Mangaoang* v. *Boyd*, 205 F.2d 553 (1953), *cert. denied*, 346 U.S. 876, the Sixth Circuit's decision in *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (1956), and respondent's own decision in *Matter of S—*, 5 I. & N. Dec. 678 (1954).

Over the strong dissenting view of three justices that established principles of construction of deportation statutes[8] required a decision against deportability, the majority of four justices in *Eichenlaub* held that the language "aliens who since August 1, 1914, *have*

---

[7] The government argued that persons convicted of such violations while citizens and subsequently denaturalized for fraudulent procurement of citizenship have in legal effect never been citizens and, therefore, may be deported even if the statute requires that the convictions occur during alienage. The Court found it unnecessary to reach the government's contention. 338 U.S. at 529-30. A similar contention by the government in the instant case (R. 87-89) was similarly not reached by the court below.

[8] See cases cited at 338 U.S. 533.

been or may hereafter be convicted . . .' specifically authorized deportation of an alien who was a citizen when convicted. 338 U.S. at 529-30. The instant statute covers "any alien . . . who . . . *is* convicted." There is no suggestion in *Eichenlaub* that such a statute specifically authorizes deportation of an alien who was a citizen when convicted. Yet, the court below found such specific authorization and found, further that *Eichenlaub* "strongly supports" its construction and that there is no ambiguity requiring application of the principle of *Fong Haw Tan* v. *Phelan, supra.*[9]

The court below, reading into *Eichenlaub* more than this Court intended, has thus raised all the difficulties foreseen by the *Eichenlaub* dissent. Certainly it cannot here be said, as the majority said in *Eichenlaub,* that the statute is a clear expression of congressional intent to lump all denaturalized persons together and deport them for convictions occurring while they were citizens. Absent such a clear expression of intent, "alien . . . who . . . is convicted" must be read to cover only those aliens who were aliens when convicted. If Congress means to cover aliens who were convicted as citizens, it must adopt past-tense language similar to that in the *Eichenlaub* statute or to that in the exclusion statute, § 212(a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(9) ("Aliens who have been convicted . . .").

The use of the present tense in § 241(a)(4), if it does not clearly restrict deportation to persons convicted while they were aliens, must at least raise an ambiguity which, under the *Fong Haw Tan* principle

---

[9] Referred to by the dissenting justices in *Eichenlaub*. See note 8, *supra*.

must be resolved against deportation. The court below held, however, that, since petitioner is now an alien, "there is no room for interpretation or construction." R. 129. "In the context of the statute," said the court, "the word 'is' appears to us to be the most comprehensive word that could have been used, just as is the case with the phrase 'at any time after entry'." R. 129-30. The court thus ignores the fact that in other subdivisions of the very same subsection of the 1952 Act, Congress, when it meant post-entry misconduct, no matter when occurring, to be a ground of deportability, did not use the so-called "comprehensive" word "is", but rather spelled out its meaning in clear and specific language.[10]

The contention that "is" may be read as "has been" in a deportation statute was rejected by the Ninth Circuit in *Mangaoang* v. *Boyd*, 205 F.2d 553 (1953), *cert. denied*, 346 U.S. 876, in holding that a statute permitting deportation of "aliens who are members

---

[10] For example, deportation is authorized of any alien who:

§ 241(a)(7): "is engaged, or at any time after entry *has engaged*", in certain conduct;

§ 241(a)(11): "is, or hereafter at any time after entry *has been*, a narcotic drug addict, or who at any time *has been* convicted of a" narcotics violation;

§ 241(a)(12): "is or at any time after entry *has been* the manager, or is or at any time after entry *has been* connected with the management, of a house of prostitution or any other immoral place";

§ 241(a)(15): "at any time within five years after entry, shall *have been* convicted of violating the provisions of Title I of the Alien Registration Act, 1940";

§ 241(a)(16): "at any time after entry, shall *have been* convicted more than once of violating the provisions of Title I of the Alien Registration Act, 1940."

of . . . the Communist Party of the United States'"[11] was inapplicable to an alien who had been a member of the Communist Party while he was a "national" of the United States, but had abandoned that membership before losing his nationality. The court, distinguishing *Eichenlaub* on the statutory language, said:

> "We think that the language here under consideration, namely, 'Aliens who *are* members of * * * the Communist Party', (emphasis ours) was intended to refer to persons who are at the same time both aliens and members of the Communist Party. We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." 205 F.2d at 555.

The significance of the present-tense language of the *Mangaoang* statute was re-emphasized by the Ninth Circuit when it distinguished that case in sustaining a deportation order in *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524, 525 (1956), under a statute applying to "any alien who was convicted . . . , prior to entry, of a . . . crime . . . involving moral turpitude. . . ."

The contention that *Eichenlaub* is authority for applying a present-tense deportation provision to an alien who was a citizen when the ground of deportation occurred was rejected by the Sixth Circuit in *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (1956). Deportation was there sought under an earlier version of what is now the first part of § 241(a)(4), applying to "any alien who . . . is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral

[11] Internal Security Act of 1950, § 22, 64 Stat. 1006.

turpitude, committed within five years after the entry of the alien to the United States. . . ." In reversing the deportation order, the court said:

> "The ruling ordering deportation in United States ex rel. Eichenlaub v. Shaughnessy, supra, was based upon the statute of May 10, 1920, 8 U.S.C.A. § 157, which was a special statute dealing with sabotage and espionage during the first World War and applicable to some 650 aliens then in custody. We do not believe that the construction given to the different wording of that statute is applicable to the general deportation statute which we are now considering." 239 F.2d at 666-67.

The respondent itself, in its administration of the immigration laws, has distinguished between present-tense and past-tense language as affecting an alien who was a citizen when the ground of deportation occurred. Thus in *Matter of S—*, 5 I. & N. Dec. at 680 n. 2, the Board of Immigration Appeals, sustaining an exclusion[12] of an alien for a crime committed while he was a citizen, pointed out that it was relying on the "ordinary meaning" of the statutory language and distinguished *Mangaoang* as being based on a statute framed in the present tense.

In brief, the court below has made an unwarranted extension of this Court's narrow holding in *Eichenlaub* and, in so doing, is in conflict with other circuits, with the position elsewhere taken by respondent itself, and with the spirit of this Court's *Fong Haw Tan* rule. It is submitted, therefore, that the concern for "the importance of the issue to American citizenship" which

[12] The exclusion statute, § 212(a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(9), applies to "aliens who have been convicted. . . ."

caused this Court to review *Eichenlaub* argues more strongly for grant of this petition.

2. In its forced construction of § 241(a)(4), the court below is in conflict with the Ninth Circuit in another respect as well. Section 241(b) of the 1952 Act, 8 U.S.C. § 1251(b), provides that § 241(a)(4) shall not apply where the convicting court, at the time of first sentencing "such alien" or within thirty days thereafter, recommends that "such alien" not be deported. The Ninth Circuit held in *Gubbels* v. *Hoy*, 261 F.2d 952, 954 (1958), that § 241(a)(4) must be read in the light of § 241(b), so that Congress must be held to have intended that § 241(a)(4) should not apply to an individual convicted in circumstances making the privilege of § 241(b) "not readily available" to him. The court below lumped the *Gubbels* decision with those of the Ninth Circuit in *Mangaoang* v. *Boyd, supra,* and *Ressurreccion-Talavera* v. *Barber, supra,* as cases unnecessary to discuss, adding that it expressed "no opinion relative to the validity and persuasiveness of the reasoning upon which these decisions are based." R. 132. Actually, however, the decision below conflicts with *Gubbels,* just as we have shown it to conflict with the other two Ninth Circuit opinions. By the language of § 241(b), the privilege afforded by that provision is available only to an alien. Therefore, under *Gubbels,* § 241(a)(4) must be held inapplicable to one not an alien at the time of conviction and sentencing. The court below deprives petitioner of the protection of § 241(b) on a theory of waiver and declares that petitioner, being chargeable with knowledge of his fraudulent naturalization, should and could have applied for a recommendation against deportation at the time he was sentenced. In this respect the court below disagrees

with respondent's Special Inquiry Officer[13] who, in first ordering petitioner's deportation, held that the option to treat petitioner as an alien belonged not to the petitioner, but only to the government and that, until denaturalized by a court at the instance of the government, petitioner was recognized as a citizen for all purposes. R. 57. It is submitted that the cavalier treatment of § 241(b) by the court below justifies review by this Court, especially since that statute has never been interpreted by this Court.

3. Section 19(a) of the Immigration Act of 1917, the predecessor statute of § 241(a)(4), had provided for deportation of aliens "sentenced more than once" for certain crimes. In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, involving an alien convicted of two counts of murder, this Court construed the statute to apply only if the second crime was committed after imposition of sentence for the first. The stated basis for the Court's decision was the principle that a deportation statute should be interpreted as generously as possible in favor of the alien. And this principle applies, said the Court, even if a less generous construction "might find support in logic." 333 U.S. at 10. To overcome the effect of this decision, the 1952 act, in § 241(a)(4), made deportability hinge upon "convictions . . . regardless of whether . . . in a single trial", rather than upon sentencing. It limited deportability, however, to cases of crimes "not arising out of a single scheme of criminal misconduct . . .". The legislative history of the new statute, beyond evincing an intent to overcome the

[13] See also *United States* v. *Stephan*, 50 F. Supp. 445, 448 (E.D. Mich. 1943).

Fong Haw Tan decision sheds no light on the meaning of the new language.[14]

The Board of Immigration Appeals, treating the new statute as an expression of intent to deport the greatest possible number of twice-convicted aliens, soon began to construe the "single scheme" limitation as narrowly as possible, reading it as if it said "single act or transaction".[15] The earliest judicial expressions on the new statute followed the administrative view. The first was a *dictum* in *Fitzgerald ex rel. Miceli* v. *Landon*, 238 F.2d 864, 865-66 (1st Cir. 1956), that Congress intended to save from deportation only the alien who, "while engaged in a single criminal enterprise, might be guilty of two or more distinct offenses." The same

---

[14] S. Rep. No. 1137, H. R. Rep. No. 1365, and Conference Rep. No. 2096, all 82nd Cong., 2d Sess. (1952); see also *Wood* v. *Hoy*, 266 F. 2d 825, 828-29 (9th Cir. 1959), and *Khan* v. *Barber*, 147 F. Supp. 771, 773 (N.D. Cal. 1957).

[15] See cases cited in *Wood* v. *Hoy*, 266 F. 2d at 830, n. 4.; see also Auerbach, *Immigration Laws of the United States* (2d ed., 1961), p. 422:

> "The natural and reasonable meaning of the phrase 'not arising out of a single scheme of criminal misconduct' according to the Board of Immigration Appeals, is that an alien who has performed an act which, in and of itself, constitutes a complete, individual and distinct crime, becomes deportable when he again commits such an act, provided he is convicted of both. The fact that one may follow the other closely, even immediately, in point of time is of no moment. Equally immaterial is the fact that the crimes are similar in character, or that each distinct and separate crime is part of an overall plan of criminal misconduct. Simply because an alien commits a crime and later repeats his offense the conclusion does not follow that the offense is a part of a single scheme, even though the crimes were similar, if each criminal act was a complete and distinct offense for which the alien was convicted."

interpretation was made in *Khan* v. *Barber*, 147 F. Supp. 771, 774 (N.D. Cal. 1957), dealing with convictions of attempted tax evasion in two successive years. The court said:

> "... Congress contemplated nothing more than those situations where an alien's conviction is based on a multiple count indictment charging him with separate crimes, which were committed by the doing of a single act or a series of simultaneous or closely related and closely connected acts."

The Ninth Circuit, in affirming the *Khan* case, adopted the trial court's interpretation of the statute. 253 F.2d 547, 549 (1958), *cert. denied*, 357 U.S. 920.

The first expression of a contrary view was by Judge Herlands in *Jeronimo* v. *Murff*, 157 F.Supp. 808, 815 (S.D. N.Y. 1957). Relying on the principle of *Fong Haw Tan* in holding four distinct and separate larcenies to be crimes arising out of a single scheme of criminal misconduct, the court said:

> "The statute reads: 'not arising out of a single scheme of criminal misconduct.' It does not read: 'not arising out of a single act or single transaction.' The words 'not arising out of' mean not occurring in the course of the performance of the single scheme.
>
> "The statute does not point to any one element of evidence as the vital and all-determining factor. It is necessary to distinguish between one or more evidentiary facts tending to prove or disprove the singleness of the scheme and the ultimate statutory fact. In a particular situation, the circumstance that the defendant committed a number of different crimes at or about one time as the result of the same criminal impulse or on one occasion in the course of the same transaction or episode, may be

probative of the existence of a single scheme. But it does not follow that the existence of the same criminal impulse or the same transaction are indispensable prerequisites to the proof of a single scheme.

"Other evidentiary facts may convincingly establish a single scheme. The initial formulation of the same subsisting fundamental object and purpose; the utilization of precisely the same methods and procedures in each of a series of successive situations to accomplish the original objective; the continuously interacting relationship and activities of the same person who originated and launched the project; the victimizing of the same person through all of the acts—such evidentiary facts may, in the aggregate, demonstrate the existence of a single criminal enterprise, project and undertaking. Such is the case at bar."

Jeronimo was followed by Judge Hoffman in *Zito* v. *Moutal*, 174 F.Supp. 531 (N.D. Ill. 1959), holding two separate tax violations to be crimes arising out of a single scheme.[16]

---

[16] The Board of Immigration Appeals had refused to find a "single scheme" where the two crimes are "so separated by time that they constitute individual episodes. . . ." 174 F. Supp. at 536. Replying to the administrative contention that § 241(a)(4) must be read to effectuate the intent of Congress to broaden the class of deportables, the court pointed out that, though eliminating the sentencing requirement, Congress had added the "single scheme" provision as a limitation on deportability and that the administrative interpretation "would . . . violate the well-settled rule that deportation statutes must be construed so as to resolve all doubts in favor of the alien." 174 F. Supp. at 537. The court added:

"To construe the limitation as applying only to a single criminal 'episode' is not only to resolve all doubts against the alien but also to read into the limitation a word which it does not contain. The statute does not include the word 'episode';

Both *Jeronimo* and *Zito* were followed by Judge Timbers in *Barrese* v. *Ryan*, 203 F.Supp. 880 (D. Conn. 1962), in holding successive-year violations of a tax statute to have arisen out of a single scheme. Respondent's "single episode" interpretation was rejected as was also the contention that the statute must be construed to cover the greatest number of twice-convicted aliens. 203 F.Supp. at 887.

The Ninth Circuit, which had followed the administrative interpretation in its 1958 *Khan* decision, reexamined the question the next year in *Wood* v. *Hoy*, 266 F.2d 825 (1959), a case involving conviction of two robberies several days apart. The court, in reversing the deportation order, took occasion to reject specifically both the First Circuit's dictum in *Miceli* and the oft-expressed interpretation of the respondent that "single scheme" means "single act".[17] The court said:

> "We must take the language of the statute as we find it. It says 'not arising out of a single scheme of criminal misconduct'; it does *not* say 'not arising out of a single criminal *act*.' If such latter reading had been the intent of Congress they could have so declared.
>
> "If there is any doubt as to the interpretation of this provision, that doubt must be resolved in

---

rather, it uses the phrase 'single scheme of criminal misconduct.' The word 'scheme,' although limited by the word 'single,' is broader than the Board's definition (by example) of the word 'episode.' I conclude that the Board has erroneously interpreted the statute in question, and that the proper interpretation is set forth in the Jeronimo case." *Ibid.*

[17] The Ninth Circuit did not overrule its decision in *Khan*. It is submitted, however, that what it said of *Miceli* and of the administrative decisions applies equally to its own earlier view which had been based on those repudiated authorities.

favor of the alien. [Citing *Fong Haw Tan.*]" 266 F.2d at 830.

The combined impact of *Jeronimo, Zito* and *Wood* caused the Board of Immigration Appeals to reconsider its position in 1959. An alien had been ordered deported for conviction of two false claims of unemployment insurance benefits in successive weeks. The Board of Immigration Appeals, on first consideration, followed its established view and concluded that the crimes did not arise out of a single scheme of criminal misconduct. Upon announcement of the decisions in *Zito* and *Wood,* the Board reconsidered and, taking account of the two new decisions, as well as the *Jeronimo* opinion, reversed itself and held that the two successive false claims, while constituting separate and distinct crimes, arose out of a single scheme of criminal misconduct. *Matter of F—G— and C—D—,* 8 I. & N. Dec. 447 (1959).

Since the decision below, the "single scheme" issue was treated by the Third Circuit in *Sawkow* v. *Immigration and Naturalization Service,* No. 14,048, decided January 29, 1963 (printed in Appendix C hereto, *infra,* p. 59a. The crimes there involved were receipt of a stolen motor vehicle on July 17, 1958, and theft of another vehicle belonging to a different person on July 18, 1958. The court, referring to the *Fong Haw Tan* principle that "any doubt in the interpretation of the statute must be resolved in favor of the alien" and to the rule of *Wood* v. *Hoy* that the burden of proof on the single scheme issue is on the government, held that mere proof of the convictions[18] was insufficient to

[18] In *Sawkow,* as in the instant case, the alien did not testify on the issue.

negate singleness of scheme. The government had argued that proof of "different crimes committed at different times against different persons" supports an inference of separateness of scheme, absent contrary evidence. The court pointed out, however, that, even granting that proposition, the two crimes in question could have been committed within minutes of each other and were, therefore, not shown to have been committed at different times. In the instant case, while the two crimes were technically committed a year apart,[19] they were not committed against different persons.

In the instant case, the court below has gone full circle back to the original administrative interpretation that only crimes committed as a single act or transaction can be said to have arisen out of a single scheme. It finds petitioner to have been convicted of "two separate and distinct crimes." R. 134. It finds: "The acts constituting the conviction of these two crimes are separated by a substantial interval of time." *Ibid.* And it relies heavily on the Ninth Circuit's opinion in *Khan* and the First Circuit's in *Miceli*. *Ibid.* So far

---

[19] In *United States* v. *Sullivan*, 98 F. 2d 79, 80 (2d Cir. 1938), the court said with regard to a four-count indictment charging successive-year tax evasions:

> "Indeed, the crimes charged in the indictment describe one course of conduct extending over several years, which results in separate offenses simply because the duty to file a return and pay the tax is one that recurs every twelve months."

It would be legally possible, though administratively undesirable, to put income tax returns on a weekly rather than annual basis. If that were done, each return would still be subject to a separately punishable charge. A case of successive tax evasions, however, would be in no way different from the successive weekly unemployment insurance violations which were held to have arisen from a single scheme of criminal misconduct in *Matter of F—G— and C—D—*, 8 I. & N. Dec. 447 (1959).

as all the contrary prior decisions are concerned, including that of the Ninth Circuit in *Wood* v. *Hoy*, the court below declines to discuss them, beyond saying that it "would not wish . . . to be thought to subscribe to the views expressed in" them. R. 135. It does, however, specifically set forth as a hypothetical situation coming within the statute the set of facts held in *Wood* v. *Hoy* not to come within the statute. R. 136. The court below also adopts the original administrative view that the statute should be interpreted to cover the greatest possible number of twice-convicted aliens. *Ibid.*

The court below has thus given the "single scheme" limitation of § 241(a)(4) an interpretation in conflict with the Ninth Circuit's in *Wood* v. *Hoy*. It is an interpretation, moveover, which violates the principle set forth by this Court in *Fong Haw Tan*. Finally, it reverses a course of administrative progress toward an interpretation comporting with most of the recent judicial expressions and places respondent in a position to select interpretations on a geographic basis. For all these reasons, it is submitted, the situation calls for an authoritative interpretation of the statute by this Court.

4. The court below, while relying on the *Khan* case to support its conclusion that petitioner's successive-year tax evasions did not arise out of a single scheme of criminal misconduct, ignored the Ninth Circuit's statement in *Khan* that such offenses may, in some circumstances, be said to have arisen out of a single scheme. See *Khan* v. *Barber*, 253 F.2d at 549. It further ignored as "wholly immaterial" the fact that the tax case against petitioner was established by the so-called "net worth method." R. 135. There is thus raised the question whether such proof of successive-year tax

evasions, even if it may be held to support conviction of more than one evasion, may also support deportation on the ground of multiple convictions.

In the tax case made against petitioner, there was nothing to show that his evasion of tax in the first of the years for which he was convicted was not in an amount higher than proven by the government and, indeed, high enough to provide a source of the expenditures in the second year which were held to constitute unreported income for that year. See *United States v. Costello*, 221 F.2d 668 (2nd Cir. 1955), *affirmed*, 350 U.S. 359; see also the summation of the prosecutor, R. 99 et seq. Petitioner is not here collaterally attacking the conviction for the second year. He had an option at his trial to explain the circumstances in such a way as to free himself of a second-year conviction by admitting, as to the first year, an even larger evasion than the government had proven. As this Court said in *Holland* v. *United States*, 348 U.S. 121, 138-39, as quoted by the court below in affirming petitioner's tax conviction, 221 F.2d at 671: "Once the Government has established its case, the defendant remains quiet at his peril." It would seem that the Court was justifying the imposition of this disadvantage upon the defendant by the correlative requirement that the government check and negate all relevant leads that might point to possession of a non-taxable source of the expenditures.

That there are inherent imprecisions in this method of assessing tax liability cannot be gainsaid. While this Court approved the use of the imprecise "net-worth" method, it recognized that "unless that increase [in net worth] can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent." *Holland* v. *United States*,

348 U.S. at 129. The Court also noted that "the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute." *Ibid.* It also counselled appellate courts to bear "constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Ibid.* *Holland* involved only one tax year and the liability was proven by an increase in net worth. The hazards deriving from the imprecision of the method are, of course, greatly enhanced where, as in the instant case, evasion is charged in successive years and the liability is proven not by increases in net worth, but rather by expenditures made in those years.

It may well be doubted whether, in such a case, this Court would say that it is for the taxpayer to show in which year he received the income apparently represented by his expenditures and that "he remains quiet at his peril" of being convicted in a separate count for each year in which his expenditures exceeded his reported income. But the question petitioner now raises is a narrower one. If he has taken his risk of not admitting the extent of his unreported income in the first year covered by the indictment, in the hope that he would be acquitted on all counts, but has lost his gamble and has suffered multiple convictions, may the government now treat those convictions, for deportation purposes, as convictions of two or more crimes "not arising out of a single scheme of criminal misconduct"?

It is submitted that, even if the interpretation below of the "single scheme" language of § 241(a)(4) should be deemed unworthy of review by this Court, the application of that interpretation to a case of conviction of

successive counts of tax evasion based on proof of expenditures is a question that should be reviewed. In the light of the Court's admonitions in *Holland* concerning the danger inherent in "net worth" prosecutions, whether so grave a consequence as deportation may be based on the convictions in this case is a matter this Court should rule on.

5. The court below held that the record of conviction of petitioner on two counts of the tax evasion indictment proved not only his conviction of two crimes, but also that the two crimes did not arise out of a single scheme of criminal misconduct. The court said:

> "In the absence of additional facts to support an inference that the two crimes are related we think the Special Inquiry Officer was required to find, as he did, that Costello had been convicted of two crimes 'not arising out of a single scheme of criminal misconduct.'" R. 134

The court was avowedly following, in this connection, the reasoning in *Khan* v. *Barber*, 253 F.2d at 549, where the Ninth Circuit, apparently treating the burden of proof on the "single scheme" issue as being on the alien, said:

> "Fraudulent returns in two different years could, or could not, be one plan or scheme. But we have no facts to prove such a scheme. . . . In the absence of all evidence to the contrary, complete crimes, committed on differing dates or in differing places are considered separate and different crimes, and support separate charges."

This imposition of the burden of proof upon the alien was an error which the Ninth Circuit corrected

a year later when it declared in *Wood* v. *Hoy*, 266 F.2d at 831:

> "It is just as much the burden of the government in order to establish deportability to establish that the two crimes in question did not arise out of a single scheme of criminal misconduct, as it is for the government to establish that the appellant was convicted of 'two crimes.' If it failed to prove either of these facts, appellant was not deportable under the statute."

Wood v. *Hoy* has recently been followed in this respect by the Third Circuit in *Sawkow* v. *Board of Immigration Appeals*, Appendix C, *infra*, p. 59a. See also *Zito* v. *Moutal*, 174 F.Supp. 531, 538 (N.D. Ill. 1959).

By clinging to the Ninth Circuit's reasoning in *Khan*, the court below is in conflict with the later Ninth Circuit decision in *Wood* v. *Hoy* and the recent Third Circuit decision in *Sawkow* v. *Board of Immigration Appeals*. That conflict, relating to burden of proof, a matter of fundamental importance in the administrative process, can only be resolved by this Court.

6. Petitioner submits that, even if he had some burden of proof on the "single scheme" issue, his attempt to sustain it was improperly frustrated by the respondent. The Special Inquiry Officer denied petitioner's application under § 287.4(a) of the Regulations of the Immigration and Naturalization Service, 8 C.F.R. § 287.4(a), for a subpoena calling for the testimony of his defense counsel in the tax evasion trial. No reason was stated for the denial. R. 38. The Board of Immigration Appeals justified the denial in terms of lack of specificity as to the expected testimony. R. 87. The court below, sustaining the denial, said:

> "Any summary by this lawyer of the evidence adduced at the trial or interpretations and speculation by him under the guise of testimony concerning the significance of such evidence or of the maneuvers of counsel would have plainly been completely devoid of probative force. If it was thought that specific portions of the trial transcript or indeed the whole thereof was admissible, the trial transcript or parts thereof, with or without the exhibits received in evidence, should have been offered by Costello at the hearing." R. 133.

The application for subpoena recited that the witness was expected to present evidence that the two tax violations "were not two crimes not arising from a single scheme of criminal misconduct." R. 38. Had the subpoena been granted, petitioner would have sought to obtain from the witness a comprehensible analysis of the tax evasion case which obviously could not be derived, within the compass of a deportation hearing, from a mere perusal of the thousands of pages of evidence in the trial record. The witness might well have given testimony showing that the expenditures on the second of the tax years did not really reflect income for that year. He might have testified to his own strategic decision to contest liability for the entire period of the indictment rather than admit liability for one year in order to prevent a dual conviction. See discussion *supra*, pp. 20-21.

The court below seems to suggest that only a full confession by petitioner could serve to show singleness of scheme, agreeing in this respect with the Special Inquiry Officer who tried to justify his denial of the subpoena on the ground that on the "single scheme" issue petitioner himself was "the best witness on this planet." R. 53. Whether or not the law may properly

require a confession of one tax violation to avoid conviction of two, it would seem that, for deportation purposes, § 241(a)(4), if it imposes any burden at all upon the alien, does not require a confession, but only such evidence as tends to show singleness of scheme. The attorney who handled his defense could obviously present such evidence. Indeed, on such an issue, his testimony would be more significant than petitioner's. See *Barrese* v. *Ryan*, 203 F.Supp. at 884-85.

To impose upon petitioner the burden of proving singleness of scheme while denying him the right to prove it by the proffered witness involves elements of due process which this Court should review.

7. The question whether an attempt to defeat and evade income taxes is a crime involving moral turpitude for deportation purposes has never been ruled on by this Court. In *Jordan* v. *De George*, 341 U.S. 223, the Court held that *conspiracy to defraud the United States* was a crime involving moral turpitude for deportation purposes. In the instant case, the court below, relying on *Jordan* v. *De George*, held petitioner's two convictions of violating § 145(b) of the Internal Revenue Code of 1939 to involve moral turpitude, on the theory that fraud is a necessary ingredient of those crimes.

The question whether fraud is a necessary ingredient of attempted tax evasion was dealt with by this Court in *United States* v. *Scharton*, 285 U.S. 518. The Court there held, with respect to § 1114(b) of the Revenue Act of 1926, 44 Stat. 116, an earlier counterpart of § 145(b), that, for the purpose of the statute of limitations, fraud was *not* a necessary element of the crime. Congress recognized *Scharton* to have decided that "the offense of attempting to defeat and evade income

taxes does not necessarily involve the defrauding or attempting to defraud the United States, fraud not being an essential ingredient of such offense. . . ." H.R. Rep. No. 1492, 72nd Cong., 1st Sess. (1932), p. 29. To overcome the effect of *Scharton*, Congress did not change the law to make fraud an essential ingredient of tax evasion, but rather amended the limitations provision to make the longer period apply to "the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof . . . ." Act of June 6, 1932, c. 209, § 1108, 47 Stat. 288; now incorporated in § 6531 of the Internal Revenue Code of 1954.

Any restriction of the *Scharton* rule—that fraud is not a necessary element of tax evasion—to the narrow statute of limitations issue involved in that case would seem unwarranted. The Department of Justice itself took a much broader view of *Scharton* in arguing, in *Helvering* v. *Mitchell*, 303 U.S. 391, 398, that an acquittal of tax evasion was not *res judicata* of the question of civil liability for tax penalties, because the civil liability was based on fraud, whereas, under *Scharton*, fraud was not in issue in the criminal prosecution.[20] It would seem then, that a decision that petitioner's successive-year tax evasions are deportable offenses, on the theory that they involve fraud as a necessary element, conflicts with *Scharton* and should, on that account, be reviewed by this Court.

To be sure, a crime may involve moral turpitude, quite apart from fraud, as an act of "baseness", "vileness", "depravity", "shameful wickedness" or the

---

[20] The Court found it unnecessary, in *Helvering* v. *Mitchell*, to reach the government's contention. 303 U.S. at 398.

like.[21] But, considering how widespread the practice of tax evasion has become, it may be seriously questioned whether the evader, in comparison with other criminals, may properly be called base, vile, depraved, shamefully wicked, etc.[22] Certainly the majority in *Jordan* v. *De George* did not so describe the conspirator to defraud the United States. And, if tax evaders are to be so described for deportation purposes, the serious question of the validity of the deportation statute, which the dissent in *Jordan* v. *De George* discussed but which the majority avoided, would have to be squarely faced.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
1000 Hill Building
Washington 6, D. C.
Counsel for petitioner

---

[21] See dissenting opinion of Mr. Justice Jackson in *Jordan* v. *De George*, 341 U.S. at 234-38.

[22] See *United States* v. *Carrollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939).

APPENDIX A

Immigration and Nationality Act of 1952, § 241, 66 Stat. 204, as amended, 8 U.S.C. § 1251:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

"(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

June 21, 1962

File: A12 143 440—New York, N. Y.

IN DEPORTATION PROCEEDINGS

In The Matter Of

FRANK COSTELLO (CASTIGLIA)

Respondent

CHARGES:

I & N Act—Section 241(a)(4)—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952).

I & N Act—Section 241(a)(4)—Convicted of crime committed within five years of 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951).

I & N Act—Section 241(a)(4)—Convicted two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957).

APPLICATION: Termination of proceedings

IN BEHALF OF RESPONDENT:
Edward Bennett Williams, Esq.
Harold Ungar, Esq., *of Counsel*
1000 Hill Building
839 17th Street, N.W.
Washington 6, D. C.

IN BEHALF OF SERVICE:
Morris Perlovsky
Examining Officer
5th and Chestnut Sts.
Philadelphia 6, Pa.

Decision of the Special Inquiry Officer

According to this record respondent was born in Italy on January 26, 1891; he entered the United States at New York City on April 2, 1895; he departed abroad for a visit and returned to the United States through Houston, Texas, on September 20, 1948; on September 10, 1925, he became a naturalized citizen of the United States; the Federal District Court for the Southern District of New York revoked his citizenship on March 9, 1959 on the ground that it was procured by concealment of a material fact or by wilful misrepresentation; and on February 20, 1961, the Supreme Court of the United States upheld the revocation of United States citizenship on that ground. *Costello* v. *United States*, 365 U.S. 265, 81 S. Ct. 534 (1961).

Counsel for respondent claims that respondent is stateless, and contests the second part of the second allegation of fact in the order to show cause. It is conceded that he is an alien. Whether he is now a national of Italy or of any other foreign country can have no bearing on the three charges of deportability—alienage is the indispensable fact, not present foreign nationality. No finding will be made as to whether he is a citizen of Italy or stateless.

All three charges of deportability are based upon Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204 (1952), 8 U.S.C. 1251(a)(4).[1] The first question to be

---

[1] "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . . is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

resolved is whether respondent was convicted of crimes involving moral turpitude.[2]

Respondent was convicted on April 8, 1952, in the United States District Court, Southern District of New York, for wilfully refusing to answer questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, in violation of Title 2, Section 192, United States Code, which reads:

> Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months. (R.S. § 102; June 22, 1938, ch. 594, 52 Stat. 942).

He received a prison sentence of one year on one count and six months on each of two other counts. The contention of the Service that this crime involves moral turpitude

---

[2] Although it defies definition, it has been held that the phrase "crime involving moral turpitude" does not render the deportation statute unconstitutional for vagueness. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). This wording is deeply rooted in the common law; it has appeared in immigration laws since 1891; and has been applied by judicial interpretation time and again to specific crimes. *Ibid.* The definitions of law dictionaries and some courts which have declared that "moral turpitude" means baseness, vileness, or moral depravity merely offer in substitution for one indefinite expression a multiple choice of three other vague terms. The Congress has never attempted a statutory definition.

is laid at rest by the Supreme Court of the United States in *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929):[3]

> There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved.

This conviction of respondent was appealed to the Court of Appeals for the Second Circuit. *United States* v. *Costello*, 198 F. 2d 200 (2d Cir. 1952). At page 205 the Court held that this charge to the jury was a correct statement of law:

> To find that the defendant acted wilfully you must find that he did not act in good faith when he left the presence of the Committee, or when he refused to give any testimony. A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith.

In other words, evil intent or purpose is not required for conviction under this statute, and it is for this reason that the crime does not involve turpitude. *Ablett* v. *Brownell*, 240 F. 2d 625 (D.C. Cir. 1957).

The Service has cited *Twentieth Century-Fox* v. *Lardner*, 216 F. 2d 844 (9th Cir. 1954), Cert. denied, 348 U.S. 944. Lardner was convicted of contempt of a Congressional Committee. His employment contract permitted its termination by the motion picture producer if Lardner were to "commit an offense involving moral turpitude under Federal, state or local laws or ordinances." The Court said at page 852 that the word "offense" in Lardner's contract

---

[3] Oddly, in its brief the Service cited this case in support of its stand that the crime *does* involve turpitude.

may be given a little broader meaning than "crime", and could justify dismissal for conduct that was no legal crime at all. The Court went on to say at page 852:

> It would appear that although the crime, per se, is one not historically infamous or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all the circumstances to tell the committee whether he was a Communist should be held moral turpitude as a matter of law—not on the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C.

The Court at page 851 stressed that "This being a California contract, California decisions would govern." The Court took cognizance of the Sinclair case as "authority for the proposition that moral turpitude is not an essential element of the crime," but then added, "That is not to say that the circumstances of the commission of the crime may not be saturated with moral turpitude." The "circumstances" were contained in "a complete transcript and pictorial record of the performance before Congress."

The issue in the Lardner case was whether he committed an offense involving moral turpitude. A contract of employment was at stake,—not deportation. The term "offense" was construed to be broad enough to include conduct that was not even a crime. The Court recognized that the crime of contempt of Congress was not, per se, morally turpitudinous but permitted inquiry into circumstances aliunde the record of conviction. Such inquiry is forbidden in deportation hearings. This factor clearly distinguishes Lardner from the case at hand. It was aptly put in *United States ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757, 759 (2d Cir. 1933):

> . . . neither the immigration officials nor the court reviewing their decision may go outside the record of

> conviction to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean the charge (indictment), plea, verdict, and sentence. The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted.

In *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (2d Cir. 1931), the Court said at page 1022:

> when by its definition (the crime) does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral . . . Conversely, when it does, no evidence is competent that he was in fact blameless.

For deportation purposes, conviction for contempt of Congress is not a crime involving moral turpitude.

Allegation of fact number 13 claims that respondent was convicted on May 7, 1957, in the Court of General Sessions of the County of New York, N. Y., of criminal contempt of court due to refusal to answer questions of the Grand Jury of the County of New York, N. Y. Exhibit number 14 in the record of deportation proceedings shows that Costello was adjudged guilty of criminal contempt of court following a summary proceeding. He was ordered committed to the Workhouse for a term of thirty days. Costello was punished under New York Judiciary Law, Section 750 A (5), Power of courts to punish for criminal contempts.[4] He was not convicted under the New York Penal Law, Section 600(6), Criminal Contempt.[5] "The two proceedings

---

[4] "A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: . . . contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory . . . "

[5] "A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor: . . . Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory. . . "

are wholly independent of each other" and the law "contemplates that both remedies, or either may be pursued". *Sherwin* v. *Mead*, 92 N.Y. 415, 420 (1883). The procedure under New York Judiciary Law "is not a criminal prosecution"; and conviction in a criminal action will not bar later punishment by summary proceeding since there is no violation of the constitutional provision that no person shall be subject to be twice put in jeopardy for the same offense. *Hanbury* v. *Benedict*, 146 N.Y.S. 44, 47 (1914).

Myers v. *United States*, 264 U.S. 95, 104-105 (1924) distinguishes between "proceedings for contempt" and "criminal prosecution":

> While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.

The New York Penal Law itself draws this distinction in Section 601 when it states, "A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court." Section 602 states, "Punishment for a contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment for the same offense." At page 103 in the Myers case, supra, the court declares that contempt proceedings "are *sui generis*—neither civil actions nor prosecutions for offenses". Courts having no criminal jurisdiction may nevertheless punish for criminal contempt. *In re Debs*, 158 U.S. 564 (1895); *Bessette* v. *Conkey*, 194 U.S. 324 (1904). The state statutory law and judicial authority leave no doubt that for the purposes of the deportation statute Costello was not *convicted of a crime* when he was adjudged guilty of criminal contempt in a summary proceeding under New York judiciary law.

Exhibits 10 and 11 show that respondent was convicted in the United States District Court for the Southern Dis-

trict of New York on May 17, 1954, for the offense of wilfully and knowingly attempting to defeat and evade federal income tax by filing false and fraudulent income tax returns. Costello was convicted on two counts, the first relating to a tax return filed on or about January 14, 1949, for the calendar year 1948, and the other count relating to a tax return filed on or about March 10, 1950, for the calendar year 1949. This conviction arose under Section 145(b) of Title 26, United States Code.[6] The sentence was five years on each count, to run concurrently, and a fine was imposed. Since fraudulent conduct is an essential ingredient, this crime involves moral turpitude. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *Chu* v. *Cornell*, 247 F.2d 929 (9th Cir. 1957), Cert. denied 355 U.S. 892; *United States* v. *Scharton*, 285 U.S. 518 (1932); *Bloch* v. *United States*, 221 F.2d 786 (9th Cir. 1955); *Khan* v. *Barber*, 253 F.2d 547 (9th Cir. 1958), Cert. denied 357 U.S. 920.

In addition to establishing that respondent was convicted of two crimes involving moral turpitude, the Service must also show that the crimes did not arise "out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial".

Khan v. *Barber, supra,* dealt with a two count indictment charging the defendant with violation of Section 145(b) of Title 26, United States Code for wilfully attempting to defeat and evade federal income taxes for the years 1946

---

[6] Title 26, U.S.C. Section 145(b), 1939 Code, provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

and 1947 by filing two separate false and fraudulent tax returns. The Court of Appeals for the Ninth Circuit said that fraudulent tax returns in two successive years could, or could not, be one plan or scheme; and held that the records of conviction were sufficient to establish that the crimes were unrelated and did not arise out of a single scheme of criminal misconduct, in the absence of facts proving that a single scheme did exist. These are precisely the facts in the case at hand,—we have two counts charging Costello with attempted evasion of federal income taxes for two successive years by filing two separate false returns. The Service has presented the record of these convictions. Costello has not offered his testimony, but has presented the prosecuting attorney's summation on behalf of the Government in the tax case (Exhibit 15). What the prosecutor says at one point is, "If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country will break their backs carrying the load for these easy money Costellos".

The criminal case did not require that the prosecution prove that a single scheme existed, and the use of the word "scheme" in the summation was not a claim that both crimes arose out of a single scheme,—it was undoubtedly intended to mean that Costello's conduct was wilful in that he deliberately schemed or planned each offense. The summation deals basically with Costello's alleged methods of hiding income and assets. The examining officer, acting as the representative of the Service, offered in evidence an affidavit of Costello in support of motion for inspection of the minutes of the Grand Jury which returned the tax indictments (Exhibit 18). In the affidavit Costello asserts that "your deponent filed Federal Income Tax Returns which truly and accurately reflect all of his income for the said years and your deponent paid in full all taxes due thereon". The examining officer also presented the summation of defense counsel (Exhibit 17), and the testimony

of a defense witness, Alfred E. Sweeney, a public accountant (Exhibit 19). In my view, Exhibits 15, 17, 18, and 19 do not offer any probative evidence tending to establish that a single scheme of criminal misconduct either (1) did exist or (2) did not exist.

In my opinion, the rule laid down in the Khan case is that the record of conviction of two counts of attempted federal income tax evasion for two successive years, by filing two separate false returns, suffices to establish that respondent's crimes were unrelated and did not arise out of a single scheme, in the absence of probative evidence that a single scheme did exist.

Counsel for respondent has cited *Wood* v. *Hoy*, 266 F.2d 825 (9th Cir. 1959); *Zito* v. *Moutal*, 174 F.Supp. 531 (N.D. Ill. 1959); *Jeronimo* v. *Murff*, 157 F.Supp. 808 (S.D. N.Y. 1957). These three cases are distinguishable from the Khan case. Wood testified that he and another person had entered into an agreement about two or three weeks beforehand to rob (1) a certain liquor store and (2) a certain theatre; and they carried out this scheme, which resulted in Wood's convictions. The Service offered no evidence other than the records of conviction. In *Zito*, the Government merely introduced the record of conviction; the indictment charged a continuing conspiracy to commit offenses of the same type; in each case the victim was the same; the same defendants participated in the offenses; and the offenses allegedly occurred approximately nine days apart. Jeronimo was convicted of (1) conspiracy to commit bribery and larceny; (2) bribery; and (3) larceny. The Service rested upon the records of conviction. The Court held that all of the acts and transactions alleged in the single indictment were connected together and that all of such acts and transactions were in furtherance of the same conspiracy and constituted part of a common scheme and plan.

In other words, Wood's testimony that he had entered into a single scheme to commit the two robberies overcame

the record of conviction which, standing alone, could have carried the burden of establishing that there was no single scheme. In *Zito* and *Jeronimo*, the record of conviction, *per se*, did not suffice to show that the offenses were so unrelated that they did not arise out of a single scheme,—in fact, the indictment in *Jeronimo* clearly alleged a single scheme; and in *Zito* the Court said that the charges in the indictment gave equal support to a finding either way, which meant that the Government had failed to carry its onus.

Another case cited by counsel is *Miceli* v. *Landon*, 238 F.2d 864 (1st Cir. 1956). Here the Court upheld the finding that a single scheme did not exist. The entire record of the deportation hearing was not available to the Court. The opinion discusses the crimes involved, and concludes that the evidence of record "might well have been adequate to sustain the finding that the two offenses of which Miceli was convicted did not arise 'out of a single scheme of criminal misconduct' ". While we do not know what the Service presented at the deportation hearing of Miceli, the Court based its opinion on the conviction record, and we do know that in the *Kahn*, *Wood*, *Zito*, and *Jeronimo* cases the Service relied solely upon the records of conviction. In the instant case, the Service is also resting on the conviction record. Thus it becomes apparent that the same principles of law are applied in *Wood*, *Zito*, *Miceli*, *Khan*, and *Jeronimo*. In each instance, the burden of proof is regarded as resting upon the Service. In each case, the discussion makes it plain that such burden can be carried by the record of conviction *per se;* and certainly this is reasonable, for the Service is required to prove not only a negative, but probably, in most instances, a *negative state of mind* of one person,—the respondent—during an indefinite period of time prior to the first of at least two crimes. Such a ponderous burden would have rendered the deportation statute well-nigh meaningless unless the Courts had adopted this rule. On the basis of the judicial

decisions (and the facts in this regard are identical to *Khan*), it is found that the record of convictions suffices to establish that the two tax crimes did not arise out of a single scheme of criminal misconduct.

It is appropriate to take note of Costello's failure to offer his testimony on the issue of single scheme. Counsel for respondent requested the issuance of a subpoena for one Fennelly, an attorney who represented Costello at his tax trial. Counsel asserted that this person could offer evidence pertinent to the single scheme issue. Counsel admitted that the witness did not participate in the crimes but asserted that he had "knowledge of the facts". Here we are presented with a situation where counsel has the best witness on this planet seated next to him,—the respondent—yet he seeks a subpoena for someone else, a person not involved in the crimes, to speak on the question as to whether the crimes arose out of a single scheme of criminal misconduct. The request for subpoena was denied; later, counsel asked leave to submit affidavits from this person and another; this request was granted; but no affidavits were submitted. It is permissible to draw an adverse inference from this silence of Costello who, after all, is peculiarly in possession of information as to whether or not his crimes arose out of a single scheme. Being in possession of the facts and yet failing to come forward, the silence of respondent may be regarded as evidence of the most persuasive character. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923). However, I deem this inference unnecessary because it is my finding that the conviction record, in and of itself, establishes that the crimes did not arise out of a single scheme of criminal misconduct. *Khan* v. *Barber*, *supra*. This finding is totally independent of any inference which can be drawn from Costello's silence.

The second charge of deportability is keyed to respondent's 1948 return to the United States, charging him with convictions for crimes committed within five years after

entry on September 20, 1948, for which there was a sentence to confinement for a year or more. The three crimes are the two tax violations and the contempt of Congress. Counsel for respondent contends that since Costello was holding a certificate of naturalization at the time of his return to this country in 1948 he cannot be regarded as having then effected an "entry". *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (6th Cir. 1956) is directly in point. Brancato first entered the United States in 1914; he was naturalized in 1929; then left the United States and reentered in 1930; was convicted of a crime involving moral turpitude in 1932; and was denaturalized in 1939. The question was whether he was deportable for conviction of a crime committed within five years after the 1930 return. The Court held that since Brancato did not come into the United States as an alien, he did not make an "entry" in 1930. The decision recognized that the judgment of denaturalization nullified the order of naturalization *ab initio*, but the Court refused to treat Brancato as if he were an alien in 1930 when factually he was a citizen with a legally issued United States passport.

The term "entry" did not have a statutory definition until the Immigration and Nationality Act of 1952. Section 101(a)(13) of that Act, 8 U.S.C. 1101(a) limits "entry" to "any coming of an alien into the United States". Under the second part of Section 241(a)(4), it is necessary to establish that respondent is now an alien; that he was in actuality an alien at the time of an entry preceding the convictions, *Brancato* v. *Lehmann, supra;* but it is not necessary to show that he was an alien at the time of his convictions, *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521 (1950); *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524 (9th Cir. 1956). Any entry, whether it is the first coming or a subsequent one, may be used as the basis of deportability. *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422 (1933). Since the 1948 return is not deemed an entry, this record establishes only one entry

into the United States, on April 2, 1895. In *Eichenlaub*, the Supreme Court ruled that the pertinent section of law did not specify a requirement of alien status when convicted; and stated that it was not necessary to give a retroactive effect to the denaturalization.

Costello was denaturalized under Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, as amended 68 Stat. 1232; 8 U.S.C. 1451, which gives retroactive effect to his denaturalization, stating that "such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate". In *Eichenlaub*, the Court opined at page 532 that the law did not intend to preclude the Government from deporting alien offenders merely because they were convicted at times when they held certificates of naturalization later canceled for fraud. The highest tribunal then asserted that a contrary interpretation "would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it". It is my conclusion that the retroactive effect of Costello's denaturalization, specified in the statute, confers upon him an alien status at all times and for all purposes, except where the language of the Congress is deemed to have spoken otherwise. *Brancato* has held that the Congressional definition of "entry" requires coexistence of actual alienage and coming into the United States; under the holding in *Mangaoang* v. *Boyd*, 205 F.2d 553 (9th Cir. 1953), Cert. denied 346 U.S. 876, the language of the legislators demands coexistence of alienage and subversive conduct for deportability under Section 241(a)(6) of the Immigration and Nationality Act, formerly Section 4(g) of the Act of October 16, 1918, 8 U.S.C. 137, as amended by Section 22 of the Subversive Activities Control Act of 1950. These are the only exceptions. *Mangaoang* did not involve denaturalization; it concerned a Filipino who came to the United States in 1926 at a time when he was a national; he was a member of the

Communist Party from 1938 to 1939; the Philippine Independence Act of July 4, 1946, rendered him an alien on that date. The Court held that he was not deportable under the Internal Security Act of 1950 because (1) he did not effect an entry in 1926 because he was not then an alien and (2) he was not simultaneously an alien and a member of the Communist Party.

Counsel hints that *Eichenlaub* might not be followed if the same case came before the Supreme Court now. That is pure conjecture. On the other hand, we do not know if the *Brancato* decision would be accepted by the Supreme Court.

Counsel has pointed to *Rosenberg* v. *United States*, 60 F.2d 475 (3rd Cir. 1932), Cert. denied 287 U.S. 645, as authority for the proposition that the "relation back" theory (deeming a denaturalized person as having been an alien *ab initio*) should be applied only where the naturalizing court lacked jurisdiction to naturalize the subject. Rosenberg did not meet the residence requirement which was necessary to confer jurisdiction on the court. Although *Rosenberg* happened to involve lack of jurisdiction for residence, this is not the *sine qua non* for application of the relation back theory. In fact, Rosenberg was denaturalized not only on the jurisdictional ground but also for fraud. Counsel feels that *Rosenberg* is the leading authority for the "notion that illegally procured citizenship may be disregarded nunc pro tunc", as he remarks in his brief at page 8. That point was not in issue in that case, nor in *Johannessen* v. *United States*, 225 U.S. 227 (1912); nor *United States* v. *Spohrer*, 175 F. 440 (C.C.D., N.J. 1910), also cited by counsel. Costello's denaturalization, pursuant to Section 340(a) of the Immigration and Nationality Act, carries with it the statutory declaration that it is retroactive.

Counsel has mentioned that *United States* v. *Stephan*, 50 F. Supp. 445 (E.D. Mich. 1943) demonstrates that "an illegal naturalization is not a nullity for all purposes".

Stephan obtained citizenship in 1935 by fraud; he was found guilty of treason in 1942. He argued that since his naturalization was subject to revocation for fraud, upon a proceeding instituted by the Government, he should be deemed an alien retroactively and therefore incapable of having committed treason. The naturalization had not been revoked. The Court declared at page 448:

> It is self-evident that fraud in procuring the order of naturalization, although a ground for its cancellation, does not render it void but only voidable; and that until such time as his citizenship is revoked, such fraud does not lessen his obligations and duties to this country or relieve him of the solemn undertakings he made in his oath of allegiance.

All this case holds is that unless and until the individual is denaturalized by a court, he is still recognized as a citizen for all purposes. The Government had its choice of prosecuting for treason or bringing an action to denaturalize. It chose the former. Stephan was not in a position to declare himself denaturalized for fraud,—only a competent court could do so.

Counsel's citation of *Cepo* v. *Brownell*, 147 F. Supp. 517 (N.D. Cal. 1957) turns upon a denaturalization under Section 15 of the Act of June 29, 1906, 34 Stat. 601, U.S.C. 405 (1934 Ed.). This law did not specify that denaturalization was to be given a retroactive effect,—Section 340(a) of the 1952 Act under which Costello's citizenship was set aside does specify such effect. In addition, *Cepo* is outweighed by authority to the contrary cited in *In re Naturalization of Estevez*, 189 F. Supp. 705, 709 (E.D. Pa. 1960). Further, *Cepo* deals not with the denaturalized person but with those claiming derived or acquired citizenship flowing from the denaturalized person. Section 340 of the 1952 Act now spells out the status of claimants of such rights when the principal is denaturalized.

In this connection, counsel for respondent has cited *Gubbels* v. *Hoy*, 261 F.2d 952 (9th Cir. 1958). Gubbels

was convicted by a court-martial in Germany while serving with the American armed forces. The Court ruled against deportability under Section 241(a)(4) of the Immigration and Nationality Act because of the qualifying provisions of Section 241(b). The latter section wipes out the applicability of Section 241(a)(4) where (1) there has been a pardon of the pertinent crimes by the President or a Governor or (2) the court sentencing the alien makes, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation against deportation. *Gubbels* turned on the narrow point as to whether a court-martial should be regarded as a "court" within the contemplation of Congress in enacting Section 241(a)(4). This decision held that a court-martial could not have been contemplated, when considering Section 241(a)(4) in conjunction with Section 241(b), since (b)(2) could be a practical impossibility in such cases because of time lag; all of the Constitutional guarantees may not be invoked in "cases arising in the land or naval forces"; and Section 241(b) speaks of "prosecution authorities", hardly an apt description of the military authorities. In sum, the tribunal felt that the individual convicted by court-martial was deprived of an important right or privilege which the Congress had intended to be available for all who came within Section 241(a)(4). *Gubbels* is an isolated case and turns on a narrow, specific point. I see no reason to extend its impact to the instant case. Costello was prosecuted and convicted in a civilian, not a military, court. He had the benefit of all of the Constitutional guarantees. He was convicted in the United States, not abroad. And he is still protected by Section 241(b)(1) of the Immigration and Nationality Act which can eradicate his deportable status upon his receipt of a pardon as described in that section. Gubbles was unable to take advantage of Section 241(b)(2) because of a situation not of his own doing, whereas Costello's inability to derive the benefits of a recommendation against deportation was the creature of his own fraud.

During the deportation hearing counsel for respondent protested the fact that the Government sought to deport Costello on the basis of criminal convictions which he claimed were obtained in violation of respondent's legal and Constitutional rights. He specified that the evidence leading to the convictions resulted from wire tapping and from violation of the federal mail statutes. I cannot yield to counsel, for it is a long established principle that where a court had jurisdiction of the person and the subject matter, its judgment of conviction is impregnable to collateral attack. *Bowen* v. *Johnston*, 306 U.S. 19 (1939); *Bowles* v. *Laws*, 45 F.2d 669 (D.C. Cir. 1930), Cert. denied 283 U.S. 841; *In re Tinkoff*, 95 F.2d 651 (7th Cir. 1938), Cert. denied 304 U.S. 573; *Cocke, for the use of the Commercial Bank of Columbus, Mississippi* v. *Halsey*, 41 U.S. 70 (1842).

To sum up, it has here been found that Costello did not effect an entry in 1948. Thus, the second charge of deportability falls. The first and third charges of deportability are the same except that the third contains the additional item of contempt of court. It has been determined above that respondent's being adjudged guilty of contempt of court in a summary proceeding under the New York Judiciary Law did not constitute *conviction of a crime*. Since this would have the effect of reducing the third charge to the same language as in the first charge, the third charge will be dismissed. This leaves the first, which is based upon the two tax convictions and the contempt of Congress conviction. Since it was here found that the contempt offense did not involve moral turpitude, we are left with the two tax crimes. Determination has here been made that the two tax convictions involved crimes involving moral turpitude; that they did not arise out of a single scheme of criminal misconduct; and that Section 241 (a)(4) of the Immigration and Nationality Act requires deportation where the convictions occurred during a period when Costello held a certificate of naturalization which he had obtained by fraud, and which was later revoked.

retroactively. I conclude that on the basis of this record respondent is deportable on the first charge, based solely on the two tax convictions.

It is noted that respondent has a United States citizen wife, that he has resided in this country since 1895, and that he is 70 years old. In order to qualify for any relief from deportation he must show good moral character for at least the past ten years. Suspension of deportation pursuant to Section 244(a)(5) of the 1952 Act, 8 U.S.C. 1254(a)(5), as well as voluntary departure under Section 244(e), 8 U.S.C. 1254(a)(e) [which must be read in conjunction with Section 244(a)(5)] imposes this requirement. Respondent is unable to show good moral character during the requisite period because of his tax convictions. He is also statutorily barred from any relief from deportation by Section 101(f)(7) of the Act, 8 U.S.C. 1101(f)(7), because he has been confined, due to convictions, to a penal institution for an aggregate of at least 180 days. These deportation proceedings were held at the United States Penitentiary, Atlanta, Georgia, on May 23, 1961, while respondent was still serving his five- year sentence on the tax convictions. He is also ineligible for relief because he has not "been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or assumption of a status, constituting a ground for deportation", as required by Section 244(a)(5). Respondent's deportability arose when he was convicted of the tax violations in 1954.

The only application for relief from deportation made during the deportation hearing was counsel's motion that these proceedings be dismissed or terminated for failure of the Government to establish deportability. The Government has demonstrated deportability on the first charge by reasonable, substantial, and probative evidence, as required by Section 242(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1252(b)(4), and the motion of respondent is denied and an order of deportation will be

entered. Respondent was given the opportunity to specify the country to which he would prefer to go if deported, and he declined to do so.

Upon the basis of this record, the following are my findings of fact:

1. The first allegation of fact in the order to show cause is adopted as my first finding of fact;

2. You are a native of Italy;

3. The third allegation is adopted as my third finding of fact;

4. You returned to the United States at Houston, Texas, on September 20, 1948;

As to (5), (6), (7), (8), (9), (10), (11), (12), these allegations of fact are adopted as my findings of fact;

13. You were adjudged guilty of criminal contempt of court in a summary proceeding on May 7, 1957, at the Court of General Sessions of the County of New York, N. Y., pursuant to New York Judiciary Law, for which you were ordered committed to the Workhouse for thirty days;

14. The crimes named in (8) and (9) involve moral turpitude;

15. The crimes named in (8) and (9) did not arise out of a single scheme of criminal misconduct;

16. The crime named in (11) does not involve moral turpitude;

17. The facts stated in finding (13) do not constitute a conviction of a crime.

Upon the basis of these findings of fact, these are my conclusions of law:

(1) That you are deportable from the United States under Section 241(a)(4) of the Immigration and Na-

tionality Act, in that after entry you have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: (1) wilfully and knowingly attempting to defeat and evade income tax due the United States Government for the year 1948 by filing a false and fraudulent income tax return on or about January 14, 1949, and (2) wilfully and knowingly attempting to defeat and evade income tax due the United States Government for the year 1949 by filing a false and fraudulent income tax return on or about March 10, 1950, both in violation of section 145(b) of Title 26, United States Code.

(2) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act in that you have been convicted of crime committed within five years of your 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951).

(3) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act based on conviction for two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957).

ORDER: IT IS ORDERED that respondent's motion to terminate these proceedings be, and the same is hereby, denied.

IT IS FURTHER ORDERED that respondent be deported from the United States in the manner provided by law on the first charge of deportability based solely on the income tax convictions.

ABRAHAM GOLD
Abraham Gold
Special Inquiry Officer

Decision and Order of Board of Immigration Appeals

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

January 2, 1962

File: A-12143440—New York

In re: FRANK COSTELLO (CASTIGLIA)

IN DEPORTATION PROCEEDINGS APPEAL

ORAL ARGUMENT: October 2, 1961

On behalf of respondent: Edward Bennett Williams, Esq., 1000 Hill Building, 839-17th Street, N. W., Washington 6, D. C.

Also present: Harold Ungar, Esq., 1000 Hill Building, 839 - 17th Street, N. W., Washington 6, D. C.

(Alien also present)

On behalf of I&N Service: Irving A. Appleman, Esq.

CHARGES:

Order: Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952)

Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))—Convicted of crime committed within five years of 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951)

Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957)

Lodged: None

APPLICATION: Termination of proceedings

This is an appeal from the order of the special inquiry officer requiring the respondent's deportation on the first charge set forth above on the basis of the convictions in 1954 for tax evasion. The appeal will be dismissed.

The respondent, a 70-year-old married male, a native of Italy, concedes that he is an alien. These events are relevant. The respondent entered as an alien in 1895. He was naturalized in 1925. He returned from Mexico to the United States in 1948. He has the following convictions: contempt of Congress in 1952, tax evasion in 1954 (two counts), and contempt of court in 1957. His naturalization was revoked in 1959.

Deportation on the first charge is sought under that portion of Section 241(a)(4) of the Immigration and Nationality Act (8 USC 1251(a)(4) which provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Deportation was ordered on the basis of the tax convictions. The issues are whether these convictions, to constitute grounds for deportation, had to occur while the respondent was an alien, whether the convictions were for crimes involving moral turpitude, and whether they arose out of a single scheme.

THE TAX CONVICTIONS AND ALIENAGE.

This discussion is concerned with one who is an alien but who in the past was a citizen and while a citizen was convicted of crime.

We believe that the precedents hold that if the condition which is basis for deportation (e.g., conviction of crimes) is one which could occur to either an alien or a citizen, then the nationality status of the individual at the time the condition arose is immaterial. We believe that the basis for deportation here is a condition which could have occurred to either an alien or a citizen. We conclude that the nationality status of the respondent at that time was immaterial. The precedents fall into two categories. In the first are the cases decided on the basis of the fact that the ground of deportation is related to the making of an entry and that by definition only an alien can make an entry; therefore, a person who was not an alien at the time he came to the United States, had not made an entry and there was no need to consider whether he had to be an alien later when the deportable ground arose. If, however, the individual was an alien at the time of entry or if alienage at the time of entry is not a factor because the ground of deportation is not related to an entry, the issue as to the necessity of the coexistence of alienage and the occurrence of the ground of deportation requires decision, but no defined term dictates the answer.[1]

In the situation before us, alienage at the time of entry in 1895 is conceded.[2] The situation before us is one concerned not with alienage and entry but with the coexistence of alienage and the emergence of the ground of deportation. Before we consider this group of cases we shall consider the group which concerned entry since counsel relies upon

---

[1] In addition to grounds of deportation where alienage is required because an entry is involved is the ground which by its nature can be met only by one who is an alien (*e.g.*, failure to register as an alien, failure to maintain status as nonimmigrant (Sections 241(a)(5) and (9) of the Act, 8 USC 1251)), but we are not concerned with such a ground.

[2] It is proper to use the first entry. (*Banez* v. *Boyd*, 236 F. 2d 934, C.A. 9 (1956); *U. S. ex rel. Beltrage* v. *Kenton*, 131 F. Supp. 576, aff'd 224 F. 2d 803, C.A. 2 (1955)).

such cases. The cases concerned with alienage at the time of entry are *Barber* v. *Gonzales*, 347 U.S. 637 (1954) and *U. S. ex rel. Brancato* v. *Lehmann*, 239 F.2d 663, C.A. 6 (1956). Gonzales, a native of the Philippines, was a national of the United States from the time of his birth until 1946 when he became an alien. He resided in the United States continuously from his admission in 1930. Convicted of crimes in 1941 and in 1950, he was ordered deported in 1951 under that portion of Section 19(a) of the Immigration Act of 1917 (39 Stat. 889, as amended, formerly 8 USC 155(a)) which called for the deportation of an alien "who is hereafter [May 1, 1917] sentenced more than once . . . because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." An entry can be made only by an alien who has voluntarily come from a foreign port. Gonzales contended that he had made no entry for he had come neither as an alien nor from a foreign port; he had come as a national from an insular possession to the mainland. The Service contended that he should be considered as if he had been an alien coming from a foreign port because from 1934 to 1946, the law provided that for the purpose of the immigration laws, Filipinos were "considered as if they were aliens." The court ruled that Gonzales was not deportable. The Court held that until 1934 the Philippines could not be regarded as foreign, that Gonzales had not arrived from foreign, and that there was, therefore, no entry. The Court would not consider Gonzales as if he had made an entry as an alien. This disposition of the case made it unnecessary for the Court to rule on the contention that Gonzales had not been an alien in 1941 at the time of conviction.

Brancato concerned a native of Italy who had entered the United States as an alien in 1914. Naturalized in 1929, he had returned from a foreign visit in 1930 and had been convicted of a crime in 1932. He was denaturalized in 1939. Deportation was ordered under that portion of Section 19(a) of the Immigration Act of February 5, 1917,

as amended (39 Stat. 889, as amended, formerly 8 USC 155(a)) which required the deportation of an alien "who is hereafter [May 1, 1917] sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States." The district court found that Brancato had been properly ordered deported. The district court held that the denaturalization was retroactive making Brancato an alien at the time of conviction. As an additional authority, the court cited *U. S. ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521 (1950) (discussed in detail later). Upon appeal, the circuit court (one judge dissenting) reversed the district court on the ground that the law required an entry and since an entry could be made only by an alien, the law did not apply to Brancato who had entered as a citizen. Despite the denaturalization, the circuit court refused to indulge in the fiction that Brancato had been an alien at the time of entry. It went on to state that Eichenlaub was not applicable to the "general deportation statute" (Immigration Act of February 5, 1917) which the court was considering.

Passing from the cases which turn on the connection between "entry" and alienage, we come to those concerned with whether alienage must have existed when the deportable ground arose. *U. S. ex rel Eichenlaub* v. *Shaughnessy* (and *U. S. ex rel. Willumeit* v. *Shaughnessy*), 338 U.S. 521 (1950) (4-to-3 decision) concerned two aliens found to be undesirable residents of the United States whose deportation had been ordered under the Act of May 10, 1920 which in pertinent part provided:

> That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall [if found undesirable residents] • • • be • • • deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917:

> All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate * * * [The Espionage Act of June 15, 1917, as amended].

Eichenlaub, a native of Germany, became a citizen of the United States in 1936. In 1941, he was convicted for violation of the Espionage Act of 1917. In 1944, his citizenship was cancelled on the ground of fraud in its procurement. Willumeit was naturalized in 1931. In 1942, he was convicted of conspiracy to violate the Espionage Act of 1917. In 1914, his naturalization was cancelled on the ground of fraud in its procurement.

The Court found the substantial issue was whether the law required the individuals involved to have been aliens at the time they were convicted. Refusing to decide whether a retroactive effect should be given to the denaturalization orders, the Court stated:

> A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offenses are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied.
>
> * * *
>
> The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but

would prohibit the Attorney General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favor of any aliens because they were at one time naturalized citizens, the logical time at which that status would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute.

The Court pointed out the failure of Congress to make a distinction between aliens who had never been naturalized and those who had lost United States citizenship was not the result of unfamiliarity with such matters.

The dissenting opinion stated that the statute permitting the deportation of an alien should be read to apply only to the person who had been an alien when convicted. It pointed out that since the statute permitted either of the two constructions without violence to language, the construction which led to hardship should be rejected. Its review of the Congresisonal history failed to reveal that Congress had denaturalized citizens in mind when the law was passed.

Mangaoang v. *Boyd*, 205 F. 2d 553, C.A. 9 (1953), cert. den. 346 U.S. 876, concerned a native of the Philippines who resided continuously in the United States from his admission in 1926. He was a national of the United States from birth until 1946 when he became an alien. He had been a member of the Communist Party from 1938 to 1939. The membership was the basis for an order of deportation under the Act of October 16, 1918, as amended by the Internal Security Act of 1950 (64 Stat. 1006, c. 1024, Title I, Section 22) providing in pertinent part for the deportation of—

"Any alien who was at the time of entering the United States or has been at any time thereafter" a member of the following class:

> Aliens who are members of * * * the Communist Party of the United States (8 USC 137(2), 137-3(a), Supp. V 1946 ed.)

Mangaoang, who had been a national of the United States in 1938 and 1939 when he belonged to the Party, contended that the law called for the deportation only of one who was an alien and a member of the Party simultaneously. The district court ruled that membership and alienage did not have to be coexistent. *Eichenlaub* was relied upon. The circuit court, reversing, ruled that the words "aliens who *are* members" (emphasis in original) indicated that Congress referred to persons who were at the same time both aliens and members of the Party. The court distinguished *Eichenlaub* on the ground that language there calling for the deportation of certain aliens convicted "since August 1, 1914" limited deportation only in that the conviction had to be after the date given; there was no requirement that alienage must have existed at the time of conviction.

The Government had also contended that if the law called for alienage and membership to exist simultaneously, Mangaoang was deportable, nevertheless, because he had to be considered as if he were an alien since the Philippine Independence Act of 1934 provided that for the purpose of all immigration laws, Philippine nationals "shall be considered as if they were aliens." The circuit court held that there was doubt as to whether Filipinos were to be considered as aliens under all immigration laws or only under immigration laws which existed up to the time the provision went into effect but that if the directive applied to legislation which became effective subsequently, there was nothing in the law under which Mangaoang's deportation was sought which authorized the deportation of nationals who were to be considered aliens. Moreover, if a construction was possible which required deportation of nationals who

were to be considered aliens, it would raise an ambiguity which must be resolved in favor of the alien. In deciding this issue, the court also placed reliance upon the fact that the directive had become obsolete in 1946 and no longer had any effective reference to any one. Finally, as a further reason why Mangaoang was not deportable, the court pointed out that deportation was authorized only of an alien who had made an entry into the United States and that when Mangaoang came to the United States in 1926, he had not made an entry.

Resurreccion- Talavera v. *Barber*, 231 F. 2d 524, C.A. 9 (1956), involved a person born in the Philippines. He was a national of the United States from birth to 1946 when he became an alien. He entered the United States in 1934. In 1942, he was convicted of crime. In 1952, he made several visits to Mexico. He was ordered deported under Section 19 of the Immigration Act of 1917 for having been convicted of crime prior to his entry. The pertinent law provided that "any alien who was convicted * * * prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; shall * * * be * * * deported." Talavera argued that this law did not apply to him because he had been a national at the time of conviction. The court sustained the order of deportation. The court stated "that Talavera was a national of the United States and not an alien at the time of his conviction of the crime involving moral turpitude is irrelevant. * * * The statute under which Talavera was ordered deported does not include a requirement that the deportee be an alien at the time of his conviction." (p. 525)

Counsel is of the belief that the result in *Mangaoang* was different from that in *Eichenlaub* or *Talavera* because *Mangaoang* used the present tense in calling for deportation while in the other cases (counsel alleges), deportation was called for in the past tense. It follows, therefore, counsel contends that since in the instant case deportation is called for in the present tense, the result should be that

found in *Mangaoang*, i.e., a coexistence of alienage and the coming into being of the ground of deportation.

We do not believe that counsel's contention can be sustained. In the first place, the language in *Eichenlaub* is not confined to the past tense; it calls for the deportation of aliens who "have been or may hereafter be convicted." Moreover, there is nothing in *Talavera* or *Eichenlaub* to indicate that the tense affected the courts' decision. The Courts found alienage was not a necessity simply because the language did not call for alienage at the time of conviction—either an alien or a citizen could come within the language used. In *Mangaoang*, on the other hand, only an alien could comply with the language the court found controlling. That tense alone is not sufficient where the language does not eliminate all but aliens may be seen from the fact that Congress used the *past* tense in requiring the deportation of individuals for acts which could have been committed *only at a time when they were aliens*, for example, entry without inspection (Section 241(a)(2), 8 USC 1251) or failure to register as an alien (the first ground set forth in Section 241(a)(5) of the Act, 8 USC 1251). Surely something stronger than tense of a verb would have been used by Congress had there been the intent to exempt the convicted person who had been a naturalized citizen when the ground of deportability arose, but later became an alien.

That Congress would have resorted to definite language requiring coexistence of alienage and the creation of a ground of deportation is strengthened by an examination of the history of the law. In 1950, the Supreme Court, considering *Eichenlaub*, found that Congress, in enacting legislation to deport aliens, could not have been unaware of the fact that in the United States there were and would be aliens who became aliens because of the cancellation of their naturalization. The Supreme Court concluded that if Congress had desired to exempt a denaturalized citizen from the application of the immigration laws because he had been a citizen when the ground of deportation arose, provision

to this effect would have been made. This consideration is pertinent today. The Immigration and Nationality Act of 1952 was enacted with considerable thought having been given to the cancellation of naturalization (Commentary on the Immigration and Nationality Act, pp. 86-87, Title 8, Aliens and Nationality (1953); S. Rep. No. 1515, 81st Cong., 2d Sess., 754-769 (1950)). The Act was the result of the study of "each of the thousands of provisions of our immigration and naturalization laws with the end in view of appraising their adequacy, force and effect and in conjunction therewith the judicial and administrative interpretations of the provisions of the law and the rules and regulations implementing them." (S. Rep. No. 1137, 82d Cong., 2d Sess. 2 (1952),). The Senate version of what became the Immigration and Nationality Act contains a proposal based on the law involved in *Eichenlaub* (S. Rep. No. 1137, 82d Cong., 2d Sess. 21-22) and the very law was incorporated in Section 241(a)(17) of the Act (8 USC 1251). We cannot find that Congress was not aware of the existence of *Eichenlaub* or the problem of the denaturalized person when it enacted Section 241(a)(4) of the Act. Furthermore, in connection with its study of the immigration laws, Congress had before it (S. Rep. No. 1137, 82d Cong., 2d Sess. 2) the following recommendation of the Special Committee to Investigate Organized Crime in Interstate Commerce:

> The immigration laws should be amended to facilitate deportation of criminal and other undesirable aliens. To this end, the committee recommends the adoption of the legislative proposal heretofore recommended by the Commissioner of Immigration and contained in section 241 of S. 716 (82nd Cong.), now pending before the Senate Judiciary Committee.[3]

[3] See testimony of the Commissioner before the Committee on March 26, 1951 (S. Rep. No. 307, 82d Cong., 1st Sess. 579) discussing grounds of deportation similar to that found in Section 241(a) of the Act and the additional proposal for the deportation of aliens who at any time after entry were convicted of crime and declared to be undesirable by the Attorney General.

> Some of the criminals who occupy key positions in criminal gangs and syndicates are alien-born. Some came into this country illegally. Some have never been naturalized. Others obtained naturalization certificates by concealing their criminal activities. (S. Rep. No. 307, 82d Cong., 1st Sess. 15)

It appears to us that this is some indication that Congress desired that a naturalized person whose naturalization was revoked should be made the subject of deportation proceedings, and that the deportation of alien criminal elements be facilitated whether or not they had been naturalized.

Counsel, relying upon the characterization of *Eichenlaub* in *Brancato*, contends that *Eichenlaub* is not applicable. In *Brancato* the court said that *Eichenlaub* did not apply to the "general deportation statute." This statement is dicta for the case had already been decided on the theory that an entry was required and Brancato had made no entry since he had entered as a United States citizen. With due reference to the dicta of the circuit court, we would point out that the majority opinion in *Eichenlaub* made no attempt to distinguish the Act of 1920 involved from the general deportation statute and that Mr. Justice Frankfurter (joined in his dissenting opinion by two other Justices) was of the belief that "The court's decision has serious implications with respect to citizens denaturalized for reasons not involving moral blame, and who have, while citizens, committed one of a variety of acts not involving moral obliquity and certainly not endangering the security of the country but which nevertheless are covered by other statutory provisions in language similar to that before us." He gave as an example a provision of the general deportation statute which provided for the deportation of an alien convicted for violation of a narcotic law. Moreover, *Eichenlaub* has generally in both administrative and judicial opinions been considered as applying to the general deportation law (*e.g.*, *Marks* v. *Esperdy*,

198 F. Supp. 40, S.D. N.Y. (July 5, 1961) and *Matter of P-*, 4 I&N Dec. 373).

Furthermore, it is most telling that Congress which presumably knew of *Eichenlaub* placed the ground of deportation involved there in the general deportation statute in 1952 when it was made a part of Section 241(a)(17) of the Act (8 USC 1251) and provision also was made for the deportation of aliens who violate current provisions of the 1920 Act found in 18 USC 791-794, 2388, and 3241. For what it may be worth, we must point out that *Mangaoang*, upon which counsel places such reliance, also did not concern the general deportation law (Immigration Act of February 5, 1917); it involved a special law relating to the exclusion and expulsion of subversives (Act of October 16, 1918, 40 Stat. 1012 as finally amended by the Act of September 22, 1950 (64 Stat. 987)). Lastly, it must be stated that *Talavera* involved the *general immigration statute.*

Counsel contends that it is improper to apply Section 241(a)(4) of the Act to one who was convicted while he was a citizen because such application makes ineffective the provisions of Section 241(b) of the Act which permit a court to make a recommendation against deportation within 30 days of passing sentence. Counsel relies upon *Gubbels* v. *Hoy*, 261 F.2d 952, C.A. 9 (1958). *Gubbels* involved the question as to whether a conviction of a military court could be a basis for deportability. The court held that since a military court could not make a recommendation against deportation, Congress had not intended to make its sentence the basis for deportation. The issue was the nature of the tribunal whose judgment Congress intended to be the basis for deportation. This is not the issue here, where as the special inquiry officer has pointed out, it was not the nature of the tribunal but the respondent's misconduct in obtaining naturalization improperly which prevented him from obtaining a recommendation against deportation. (Actually, the question of making a

recommendation could have been raised by the respondent who had been fighting efforts of the Government to denaturalize him since at least October 1952 (Ex. 5, p. 2).)

Moreover, the fact that an alien has not had an opportunity to petition the court for a recommendation against deportation does not prevent his deportation for conviction of crime under a law which does provide for such recommendation. The right of the nation to expel aliens is absolute and unqualified (*U. S. ex rel. Circella* v. *Neely*, 115 F. Supp. 615, 626, N.D. Ill. (1953) aff'd sub nom *U. S. ex rel. Circella* v. *Sahli*, 216 F.2d 33, C.A. 7 (1954), certiorari denied 348 U.S. 964; and *Matter of L-*, 8 I&N Dec. 389, 390). See, *U. S. ex rel. Kalonis* v. *Davis*, 13 F.2d 630, C.A. 2 (1926); *Todaro* v. *Munster*, 62 F.2d 963, C.A. 10 (February 10, 1933); and *Matter of Y-M-*, 8 I&N Dec. 94. Moreover, the provisions calling for the deportation of convicted aliens and the making of recommendations against deportation have been in effect since 1917. Filipinos convicted between 1917 and at least 1934 were nationals of the United States to whom the immigration laws did not apply. Yet, in 1934 Congress had no hesitancy in providing for the application of the immigration laws, including the 1917 Act, to Filipinos for acts which had occurred (and until 1946 would occur) while they were nationals. (See, *Misina* v. *Rosenberg*, 278 F.2d 291, 296-297, C.A. 9 (1960).) Finally, there is still available to the respondent the benefits of that portion of Section 241(b) which prevents deportation of one who has obtained a pardon.

Several administrative decisions are pertinent to the issue as to the necessity of the coexistence of alienage and the conviction. *Matter of L-*, 6 I&N Dec. 666 (1955) concerned an individual who had entered the United States as an alien in 1926. He became a United States citizen in 1931. He was convicted of four crimes in 1940. In 1950, he lost United States citizenship under Section 401(g) of the Nationality Act of 1940 which provided for the expatria-

tion of a dishonorably discharged citizen who in time of war had been convicted by court martial of desertion. Deportation proceedings were brought under Section 241(a)(4) of the Act charging L- with having committed two crimes after entry. The Board sustained the order of deportation. Subsequently, the Supreme Court ruled that Section 401(g) of the Nationality Act of 1940 was unconstitutional (*Trop* v. *Dulles*, 356 U.S. 86) and because of this, on September 11, 1958 the Board withdrew its order of 1955 and terminated proceedings. Counsel in a supplemental brief presents the belief that the Board's order in 1955 was in error. He is of the belief the issue was given little consideration; that expatriation presents a different situation from a cancellation of naturalization; and that Mangaoang was distinguished administratively merely on the grounds relating to entry, ignoring the additional ground concerning the coexistence of alienage and the ground of deportability. We do not believe our decision was in error. The issue was appropriately considered and decided on the basis of precedents including *Eichenlaub*.

Matter of S-, 5 I&N Dec. 678 (1954) concerned a person who while a citizen of the United States had been convicted of theft on three occasions. Subsequently, he lost his United States citizenship by taking an oath of allegiance to a foreign government. When he attempted to return to the United States, he was excluded under the Immigration and Nationality Act as one who had been convicted of crime involving moral turpitude prior to entry. The alien contended that at the time the offenses were committed he was not an alien but a citizen and was not excludable because he had never been convicted of crime as an alien. The Board held that the contention was without merit because the Act required the exclusion of persons who were aliens without excepting those who had been citizens and suffered expatriation. *Eichenlaub* was relied upon and *Mangaoang* was distinguished by reference to its third numbered paragraph. This paragraph points out

that *Mangaoang* differs from *Eichenlaub* because in *Eichenlaub* the language "did not require a showing that at the time of conviction * * * the person in question had then been an alien" while in *Mangaoang* the language did require the person to be an alien. Counsel contends that S- was found excludable "because of the past-tense language of the statute involved" and that *Mangaoang* "was distinguished as being based on a present-tense statute similar to Section 241(a)(4)." We find no mention of tense as a reason for ordering S-'s deportation. The convictions in S- could have happened to either an alien or a nonalien, and the law did not limit deportability to those who had been convicted only as aliens. This was the basis of the decision. The same basis for decision was used in *Matter of M-*, A-11875663, Int. Dec. 1169 (July 16, 1961) which involved a native-born citizen of the United States who had been convicted of crime in 1951. He expatriated himself in 1959 by service in the armed forces of a foreign state. He last entered in 1960. His deportation was ordered under the Act as one who had been excludable in 1960 as an alien convicted of crime prior to entry.

Matter of P-, 4 I&N Dec. 373 (1951) and *Matter of W-*, 5 I&N Dec. 759, 764 (1954) involved persons who entered as United States citizens and were ordered deported for having been convicted of crime, or having admitted commission of crime prior to last entry. Counsel is of the belief that deportation was ordered because the past tense was used in the laws. In these cases, decided before *Brancato*, the Board's decision was not based upon the tense of the statute involved but upon the fact that denaturalization stripped the individual of United States citizenship retroactively. There is no basis for concluding that the Board would have acted differently had the statutory language been written *in praesenti*.

Counsel contends that to find it possible to interpret Section 241(a)(4) to make the coexistence of alienage and conviction unnecessary would make the statute ambiguous so

that a construction favorable to the respondent should be taken. The rule of the cases, however, is clear. When the law requires deportation for acts which can be performed or happen to either an alien or a citizen, nationality status at the time of the performance or happening is immaterial unless the law provides that alienage must be present. There is thus no ambiguity. Applying the rule to the language of Section 241(a)(4), we find that the act condemned-conviction can occur to either a citizen or an alien and that the law does not provide that the subject be an alien. Therefore, alienage at the time of conviction was not a necessity[4] and the charge is sustained if moral turpitude is involved and the crimes did not arise out of a single scheme of criminal misconduct.

Single Scheme

Counsel contends that the Service has failed to prove that the two convictions on which the order of deportation is based did not arise "out of a single scheme of criminal misconduct." The respondent had been indicted for filing false and fraudulent income tax returns for 1946, 1947, 1948 and 1949. The jury convicted the respondent for the years 1947, 1948 and 1949. He was sentenced to five years on each count to run concurrently and a fine was imposed. On appeal, the conviction as to 1947 was reversed.

At the deportation hearing, the respondent refused to testify. The Service presented the record of the convictions, showing in one count a violation of the law by the filing of a fraudulent return on January 14, 1949 for the calendar year 1948, and in the other count, a fraudulent filing of a tax return on March 10, 1950 for the year 1949.

---

[4] So that all major aspects of the case may be properly developed for judicial review, if it should take place, we shall subsequently discuss the issue as to whether the respondent must not be considered to have been an alien at the time of conviction.

The Service then rested. In his defense, the respondent presented the summation of the prosecuting attorney at the tax evasion trial as evidence that the convictions arose out of a single scheme (Ex. 15). The summation reveals that the Government's case is built upon the net worth theory. Proof was made of the respondent's assets in 1946, the amount of income he reported for the years 1946 to 1949, the fact that he had spent twice the money he had reported as income for those years, and the fact that there was a source from which the additional income could have come to the respondent. The sums spent over and above that which could be attributed to the assets started with and income reported were alleged to be income concealed. The belief of the respondent sets forth several instances where the prosecuting attorney, in his summation, made the point that the respondent had so conducted himself over a period of years that he had spent twice as much as he had reported, defrauding the Government of taxes due. Great emphasis is put on this statement of the prosecuting attorney. "If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country * * * will carry the load * * *." (p. 1834, Ex. 4) The respondent also submitted a subpoena for Fennelly, an attorney, who had represented the respondent at the trial on income tax evasion. It was alleged that although not a participant, the witness allegedly had knowledge of the facts which would show a single scheme. Counsel explained that the request to subpoena Fennelly came after the death of Delaney, another of the respondent's attorneys at the tax evasion trial and one who had agreed to testify. The request was denied. Counsel then requested (and received) permission to submit affidavits from Fennelly and another person. However, affidavits were not submitted. The Government presented the summation of the defense counsel at the tax evasion trial (Ex. 17), an affidavit of Costello's in support of a motion for inspection of minutes of the grand jury (Ex. 18) and

testimony of Sweeney, a defense witness at the tax evasion trial (Ex. 19).

The special inquiry officer ruled that the burden of proving that the convictions had not arisen from a single scheme was upon the Government and that in the absence of probative evidence to the contrary, a record of conviction failing to show acts in furtherance of a common plan would suffice to establish a single scheme did not exist. The special inquiry officer, relying heavily on *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, N.D. Calif. aff'd 253 F.2d 547, C.A. 9 (1958), certiorari denied 357 U.S. 920, where the facts are similar to those in the instant case, found that a single scheme had not existed.

Counsel contends the Service cannot bear its burden of establishing that the respondent's crimes did not arise out of a single scheme by merely introducing a conviction in the situation before us because there is nothing in the two successive tax evasions which negate singleness of scheme. Counsel contends the Service is under the obligation of making further proof that a single scheme was not involved. Counsel contends that *Chanan Din Khan* is wrong because it was decided in the belief that the burden of proof as to the single scheme issue was on the alien rather than on the Service, and because the term "single scheme" was equated with a single punishable crime. Counsel contends that these tests were rejected in *Wood* v. *Hoy*, 266 F.2d 825, C.A. 9 (1959).

Chanan Din Khan was reviewed in *Wood* and quoted from without criticism. It is, therefore, guiding authority for a situation such as was involved there. *Chanan Din Khan*, on facts very similar to those before us, held that an indictment showing convictions on two fraudulent returns filed a year apart is persuasive evidence that two unrelated crimes were involved. In the instant case, there is no probative evidence controverting the inference which flows from the commission of crimes a year apart. Certainly, the remarks of the prosecuting attorney at the tax evasion trial do not controvert the inference which flows

from the convictions. The prosecuting attorney was concerned with the concealment of income from the Government to avoid payment of taxes. He did not have to prove that when the respondent took the first step to defraud the Government, that he intended to continue to do so for the next three years. The word "scheme" could have been applied to actions and plans which had as their end the filing of a fraudulent tax return if only one year had been involved. It was unnecessary for the prosecuting attorney to establish that there was a *scheme* to commit both violations in order to obtain a conviction. Moreover, even if this ambiguous opinion by the prosecuting attorney, made in the heat of advocacy, referred to a conspiracy for the four years, it would not be controlling as to the actual state of mind of the respondent. In fact, if the opinion of the prosecuting attorney were meant to express the belief that when the respondent filed his return for 1946 he conspired to defraud the Government in the next three years, it was an opinion not shared by the jury which acquitted the respondent on the charge involving the year 1946.

Counsel cites *Matter of F-G- and C-D-*, 8 I&N Dec. 447, in support of his contention that the convictions in the instant case arose out of a single scheme. In the administrative decision cited, the first alien had been convicted on two counts of making a false statement for the purpose of obtaining unemployment insurance benefits. In count one he was charged with making the first false statement and in count two with making the second false statement a week later. The Board decided that it was proper to conclude that when the alien falsely represented he was unemployed to obtain benefits, he intended to do it again on the following week, although the inference might be too broad if attempt were made to extend it to the entire 26 weeks of benefits. In the instant case, it would be even less proper to infer that the intention to falsify the return filed in March 1950 was formed in January 1949 when the prior fraudulent return was filed (*Chanan Din Khan* v. *Barber*, supra).

Counsel contends that the net worth theory by its very nature prevents a showing that two crimes did not arise out of a single scheme. This contention is based on the belief that under the net worth theory, convictions for two successive years are possible upon proof of facts which show no more than that the indicted person received a sum of money in one year and spent it in two successive years without reporting what was spent as income in either year. In other words, the possibility is raised that in January 1949, the respondent evaded the payment of taxes then due on income which he had received in 1948 and that although in March 1950, he filed a return showing some income in 1949, it could have been from the same income concealed in 1948 that the money came which was spent in 1949 in excess of that reported. It is answer enough that there is no proof that the convictions for 1948 and 1949 were the result of a conspiracy to evade payment of taxes for income which had been received only in 1948. On the contrary, the record of that trial reveals there was income for both 1948 and 1949 (Ex. 19, pp. 1679(a)-1681(a)). Moreover, an examination of the reported tax conviction case reveals the following pertinent charge to the jury.

> This [net worth] method involves determination of the defendant's net worth at the beginning and end of a period in order to foreclose the possibility that the expenditures were made, or the net worth increases were derived, from prior accumulated funds.
>
> • • •
>
> In order for you to find that sums received by the defendant during any of the taxable years constituted income to him, it is not necessary for the Government to have proved the exact source of the income. None of the alleged excess investments and expenditures made by the Costellos during any year shall be considered in determining the taxable income of the defendant Frank Costello in any year unless you find that there was an excess of expenditures and invest-

ments, and that it constituted money which the defendant received as taxable income during the year in which the money was spent. (*United States* v. *Costello*, 221 F.2d 668, 676, C.A. 2, aff'd 350 U.S. 354)

The net worth theory is a method for proving that a crime was committed during a particular year. Its use does not negate the possibility that the crimes were the results of independent volitions made from year to year rather than at one time in a particular year.

MORAL TURPITUDE

We come now to the question of whether the special inquiry officer properly found that the respondent's convictions on two counts for violation of 26 USC 145(b) involve moral turpitude. The special inquiry officer, relying upon judicial precedents, found that fraud was an ingredient, and that moral turpitude was present. The issue was fully discussed by the special inquiry officer. Counsel contends that *United States* v. *Scharton*, 285 U.S. 519 (1932) and *United States* v. *Carrollo*, 30 F. Supp 3, W.D. Mo., 1939, require a contrary finding. Similar contention based upon the cases cited by counsel was made in *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, 775, N.D. Calif. (1957), which concerned violations of the same section involved in the instant case. The court found that moral turpitude was present. The decision of the court was affirmed upon appeal 253 F.2d 547 and certiorari was denied 357 U.S. 920. We see no need to discuss this issue further.

We find no reversible error in the denial for the issuance of a subpoena for Fennelly. The issuance of a subpoena is a discretionary matter. While the respondent was entitled to produce evidence in such form as he desired, there was no abuse of discretion in denying the subpoena in the absence of some more specific statement as to the testimony which the witness could offer.

The respondent's deportability is established on the first charge because of convictions for evasion of taxes.

RELATION BACK THEORY

Our conclusion is that alienage and conviction need not be coexistent; however, as we previously indicated, we shall consider the issue as to whether the respondent should be regarded as having been an alien at the time of the conviction since he has been denaturalized under Section 340(a) of the Act (8 USC 1451). The second provides that revocation "shall be effective as of the original date of the order and certificate." The special inquiry officer found the law to be that denaturalization is retroactive and confers upon the subject the status of an alien at all times and for all purposes, except that one who entered while naturalized may not be considered as having entered as an alien, and except that certain language providing for the deportation of an alien who is a member of a proscribed organization, requires that there must be a coexistence of alienage and membership. The special inquiry officer ruled that since Costello fell in neither of the exceptions, he must be considered as having been an alien at the time of the conviction. Counsel contends that the "relation-back" theory should not be applied because judicial precedents require that a denaturalized person be regarded as if he had been a citizen before the denaturalization even though he was not lawfully entitled to be naturalized. We believe that the "relation-back" theory is properly applied here.

Prior to the Immigration and Nationality Act, it was established that a revocation of naturalization, whether for fraud or for illegality, was retroactive (*U.S. ex rel. Brancato* v. *Lehmann*, supra). While there was general agreement that the denaturalized person must be considered as an alien from the time of the denaturalization, the rule of the cases appears to have been that the fiction that alienage existed at any particular moment in the past would not be indulged in if the individual would be required to do what was impossible of performance. Thus, the fiction was not indulged in where it would require an individual who entered as a United States citizen to have

been in possession of the documents required of an alien (*Matter of C-*, 3 I&N Dec. 275, A.G., 1950). In the same vein, it was improper to consider one who did something as a national of the United States, as if he had done it while an alien (*Barber* v. *Gonzales*, supra). However, the relation-back doctrine was applied where it did not require the "impossible" of the alien (*Matter of P-*, 4 I&N Dec. 373).

Although it is the contention of counsel that it is improper to apply Section 340 (a) to a deportation section, we see nothing in the wording or the history of this law (which at the minimum merely restates what was decided judicially) that would prevent its application to deportation proceedings. The section can be given effect in the case before us without violence to precedents if we consider the respondent as an alien at the time he was convicted. The commission of crime or the conviction was not related to nationality. To consider the respondent as having been an alien at the time of the conviction imputes to him no action which he, as a citizen, could not have done. No impossibility is asked for. We believe it is proper for the purposes of Section 241(a)(4) of the Act to consider the respondent as having been an alien at the time of his conviction. (*Cf. Mesina* v. *Rosenberg*, 278 F.2d 291, C.A. 9 (1960))

Counsel contends that Congress could not have intended the relation-back theory to apply because in Section 241(b) provision was made for a recommendation against deportation, a provision which would be of use only to an alien. This contention has been previously considered; we pointed out that Congress has the power to deport an alien who had no access to a recommendation against deportation. Congress must have realized that the 30-day period within which such a recommendation could be made would have passed by the time of the denaturalization, and may have been content to permit the denaturalized person to resort to a pardon.

At oral argument, counsel expressed the belief that the special inquiry officer had used *Eichenlaub* as authority to give a retroactive effect to alienage (p. 4 of oral argument). Although the special inquiry officer gave a retroactive effect to the denaturalization, he did not use *Eichenlaub* as authority for this. (See last sentence on p. 15 of the special inquiry officer's opinion.) The special inquiry officer relied upon the statutory declaration in Section 340(a) of the Immigration and Nationality Act (p. 18 of special inquiry officer's opinion).

The special inquiry officer found the respondent deportable on the first charge. The first charge is superfluous; it is contained within the third. The record does not establish the respondent's deportability on the second charge for the reasons stated by the special inquiry officer. The respondent's deportability on the third charge is sustained, based on the tax evasion convictions; deportability on the basis of the other convictions has not been established.

The findings of fact and conclusions of law of the special inquiry officer are adopted except Conclusion of Law No. 3 will be amended to eliminate the convictions in 1954 for tax evasion as grounds on which the respondent is not deportable:

> (3) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act based on conviction for two crimes after entry (contempt of Congress in 1952; contempt of court in 1957).

ORDER: It is ordered that the appeal be dismissed.

IT IS FURTHER ORDERED that the respondent be deported from the United States in the manner provided by law on the third charge of deportability based solely on the income tax convictions.

* * * * * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81—October Term, 1962

(Argued November 9, 1962 Decided December 4, 1962)

Docket No. 27597

FRANK COSTELLO, *Petitioner*,

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*.

Before:

MEDINA, SMITH and KAUFMAN, *Circuit Judges*.

Petition, pursuant to 8 U.S.C. Section 1105(a)(1), to review an order of deportation sustained by the Board of Immigration Appeals. Petition dismissed.

EDWARD BENNETT WILLIAMS, Washington, D. C. (Harold Ungar, Washington, D. C., on the brief), *for petitioner*.

ROY BABITT, Special Assistant United States Attorney, New York, N. Y. (Vincent L. Broderick, United States Attorney for the Southern District of New York, New York, N.Y., on the brief), *for respondent*.

MEDINA, *Circuit Judge:*

Frank Costello, an alien, entered the United States from Italy in 1895; he became a naturalized citizen in 1925; he was convicted in 1954 of income tax evasion for the years 1948 and 1949, under two counts of a single indictment that

contained no conspiracy charge, *United States* v. *Costello*, 2 Cir., 1955, 221 F. 2d 668, affirmed, 1956, 350 U. S. 359; and in 1959 his naturalization was revoked. *United States* v. *Costello*, 2 Cir., 1960, 275 F. 2d 355, affirmed, 1961, 365 U. S. 265. Deportation proceedings based upon the two convictions resulted in the order of deportation now sought to be reviewed under 8 U. S. C. Section 1105(a)(1), after an unsuccessful appeal to the Board of Immigration Appeals.

The controlling statute is Section 241(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Section 1251 (a), the pertinent provisions of which follow:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; * * *.

Costello's contentions are: (1) that the statute was not intended to apply to a person of naturalized status at the time of the convictions; (2) that the Government failed to establish conviction of two crimes "not arising out of a single scheme of criminal misconduct"; (3) that convictions of tax evasion did not constitute convictions of crimes involving moral turpitude; and (4) that it was prejudicial error not to issue a subpoena to the lawyer who represented Costello at the criminal trial for tax evasion, and who allegedly would have testified to the effect that the two convictions did arise "out of a single scheme of criminal misconduct."

We find no merit in any of these contentions and dismiss the petition.

I

After several years of intensive study the Congress passed the Immigration and Nationality Act of 1952, and it became law. One of the specific objectives of this legislation, largely in response to recommendations by the Senate Special Committee to Investigate Organized Crime in Interstate Commerce,[1] was to broaden the provisions governing deportation, "particularly those referring to criminal and subversive aliens."[2]

As the construction of the statute relied upon by Costello would frustrate the general legislative purpose just referred to, and in effect grant immunity, during the period between the granting and the revocation of naturalization, to those who fraudulently obtained the status of citizens, it would seem to require at least a fairly persuasive argument to induce us to interpret the statute in such fashion as to require, as a prerequisite to deportation in the case of a denaturalized person, two convictions of crime either prior to his naturalization, or subsequent to the revocation thereof for fraud. In other words, despite the fact that the person sought to be deported has not only been twice convicted of crime, but also has obtained citizenship status by fraud, we are told that by some mischance the statute has been so worded as to leave a loophole through which Costello may avoid deportation.

When the various integral parts of the statute are read together, as they must be, it is not surprising to find that no such loophole exists. There is no ambiguity, and no occasion to apply the rule of *Fong Haw Tan* v. *Phelan*,

---

[1] House Report No. 1365, 82nd Cong., 2nd Sess. (1952), p. 28.

[2] *Commentary on the Immigration and Nationality Act*, Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, 8 U. S. C., Part I, p. 61.

1948, 333 U. S. 6, to the general effect that doubts are to be resolved in favor of the deportee.[3]

Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, in his Commentary on the 1952 Act, *supra*, 8 U. S. C. at page 18, states: "Section 1101 dealing with definitions is to be regarded as probably the most important, truly pivotal segment of the statute." See also House Report No. 1365, *supra*, page 31. 8 U. S. C. Section 1101(a)(3), Section 101(a)(3) of the Act, defines an "alien" as "any person not a citizen or national of the United States." Accordingly, as the statute speaks in terms of the time of enforcement, when Section 241(a)(4), 8 U. S. C. Section 1251(a)(4), directs that any "alien * * * shall * * * be deported who * * * at any time after entry is convicted of two crimes involving moral turpitude," there is no room for interpretation or construction. At the time the proceedings for deportation were commenced Costello was a person not a citizen or national of the United States and the date of his two convictions is at a time after his entry into the United States. In the context of the statute the word "is" appears to us to be the most comprehensive word that could have been used, just as is the case with the phrase "at any time after entry."[4] See Sutherland, Statutory Construction, 3rd Ed., 1943, Section 4930.

---

[3] The doubt thus resolved in *Fong Haw Tan* concerned the meaning of the words "sentenced more than once," various Courts of Appeals in several Circuits having given this phrase different and conflicting constructions.

[4] Costello's contention that the use of the word "is" requires that alienage and the deportable crimes be simultaneous rests too much upon this single word of the statute and gives the language of the statute a meaning contrary to its natural tenor. Indeed, the Supreme Court has paraphrased this section as providing for "the deportation of an alien who 'at any time after entry' has been convicted of two crimes involving moral turpitude." *Lehmann v. United States, ex rel. Carson*, 1957, 353 U. S. 685, 689, rehearing denied, 354 U. S. 944.

Far from supporting Costello's argument on this point, *Eichenlaub* v. *Shaughnessy*, 1950, 338 U. S. 521, strongly supports the Government view of the meaning of Section 241(a), 8 U. S. C. Section 1251(a). There "all aliens who since August 1, 1914, have been or may hereafter be convicted" of violations of the Espionage Act of 1917, as amended, were made deportable, provided the Attorney General after a hearing found them to be undesirable residents of the United States. Thus the time of conviction is stated to be, as paraphrased by the Supreme Court, at page 530, "since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920," when the statute under consideration became effective. In Section 241(a), 8 U. S. C. Section 1251(a), before us now, the time of the convictions is stated to be "at any time after entry." What the Supreme Court decided was precisely the point now raised by Costello, and it was decided against the deportee. *Eichenlaub* had fraudulently procured his naturalization, and the revocation or cancellation of his certificate of citizenship took place after his conviction. So he argued that he was not an alien when convicted and that the statute was not applicable, as it did not in terms include an alien who was not an alien at the time of his conviction. This was supposed to be at least an ambiguity to be resolved in favor of the deportee. Despite a strong dissent by Mr. Justice Frankfurter on the basis of this identical argument, the Supreme Court found no ambiguity, and held, at page 530:

> A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized.

So here, the language of the statute is all inclusive, there are no exceptions. And, to paraphrase the comment in *Eichenlaub*, at pages 530-1, it is difficult to imagine a reason for the Congress to provide for the deportation of an alien, convicted of two crimes involving moral turpitude, who had never been naturalized, but to prohibit the deportation of an alien who had not only been convicted of two crimes involving moral turpitude, but had in addition fraudulently secured a certificate of citizenship. Such a distinction simply does not make sense.

The Congress, in the formulation of the provisions of the 1952 Act, desired to merge all existing statutes, judicial decisions, and administrative interpretations into a single, comprehensive, completely revised immigration and nationality code.[5] There is internal as well as external evidence that those who drafted this code were aware of the decisions of the Supreme Court and of other courts relevant to their task, including *Eichenlaub*.[6]

The cases relating to allegedly analogous situations, relied upon by Costello are all distinguishable. For purposes of reference, we have collected them in a footnote,[7] but think to discuss them in detail would carry us too far afield. Moreover, we express no opinion relative to the validity and persuasiveness of the reasoning upon which these decisions are based.

A subsidiary point made by Costello on this phase of the case is that he could not fairly be considered to

---

[5] Sen. Report No. 1515, 81st Cong., 2nd Sess. (1950), pp. 1-4; Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, 82nd Cong., 1st Sess. (1951), pp. 1-4; House Report No. 1365, *supra*, pp. 27-28.

[6] Sen. Report No. 1515, *supra*, pp. 390-2; Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, *supra*, p. 694.

[7] *Mangaoang* v. *Boyd*, 9 Cir., 1953, 205 F. 2d 553, cert. denied, 346 U. S. 876; *Gubbels* v. *Hoy*, 9 Cir., 1958, 261 F. 2d 952; *Resurreccion-Talavera* v. *Barber*, 9 Cir., 1956, 231 F. 2d 524.

be an alien convicted of two crimes involving moral turpitude, within the meaning of Section 241(a), 8 U. S. C. Section 1251(a), as such a construction would, as to him, render meaningless and nugatory the provisions of Section 241(b)(2), 8 U. S. C. Section 1251(b) to the effect that Section 241(a), 8 U. S. C. Section 1251(a), shall not apply "if the court sentencing such alien for such crime shall make * * * a recommendation to the Attorney General that such alien not be deported."

It is a sufficient answer to this contention, we think, to say that any rights arising out of Section 241(b), 8 U. S. C. Section 1251(b), were waived by Costello as he had secured his naturalization by fraud. Moreover, Costello is chargeable with knowledge that he had procured his naturalization by fraud, and that deportation proceedings might well follow his conviction on any two of the counts in the indictment for tax evasion. There was thus nothing to prevent his asking the sentencing court for a recommendation to the Attorney General that he be not deported. In any event, there is no inherent right to the limited privilege afforded by Section 241(b), 8 U. S. C. Section 1251(b). Basically, of course, we come back to the comment in the opinion of the Supreme Court in *Eichenlaub* above referred to. It is nothing short of absurd to suppose that the Congress intended to favor the alien who, over and above his convictions for crimes involving moral turpitude, had been sufficiently clever and unscrupulous to have defrauded the Government into providing him with the protection of a certificate of citizenship.

II

Did the two crimes of income tax evasion arise "out of a single scheme of criminal misconduct"? Costello says they do; we think they do not.

The only evidence relevant to this issue is the record of the convictions, offered by the Government. Costello did

not testify. The application for a subpoena to procure the testimony of the lawyer who represented Costello at the criminal trial was properly denied. Any summary by this lawyer of the evidence adduced at the trial or interpretations and speculation by him under the guise of testimony concerning the significance of such evidence or of the maneuvers of counsel would have plainly been completely devoid of probative force. If it was thought that specific portions of the trial transcript or indeed the whole thereof was admissible, the trial transcript or parts thereof, with or without the exhibits received in evidence, should have been offered by Costello at the hearing. No such offer was made; and no ruling admitting or excluding such proof is before us for consideration; so we shall not comment further on this peripheral, so-called procedural point. It has no merit whatever.

Before we address ourselves to the phrase "single scheme of criminal misconduct," it is essential that we have before us a brief description of what the record shows as well as what it does not show. We have already observed that the indictment contains no conspiracy count.

The judgment of conviction under date of May 17, 1954 "adjudged" Costello guilty "of the offense of wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife for the years 1947-1948-1949, by filing false and fraudulent joint income tax returns," in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. (1940 ed.) Section 145(b). We reversed as to the year 1947, and affirmed the conviction of attempting to evade income taxes for the years 1948 and 1949, *United States* v. *Costello*, 2 Cir., 1955, 221 F. 2d 668; and the Supreme Court affirmed, 1956, 350 U. S. 359. The prosecution proved its case against Costello by the "net-worth method."

Indubitably the two crimes charged in the counts relative to the years 1948 and 1949 are two separate and distinct crimes. *Myres* v. *United States*, 8 Cir., 1949, 174

F. 2d 329, 334, cert. denied, 338 U.S. 849; *United States* v. *Johnson*, 7 Cir., 1941, 123 F. 2d 111, 119, rev'd. on other grounds, 1943, 319 U. S. 503; *United States* v. *Sullivan*, 2 Cir., 1938, 98 F. 2d 79, 80. The acts constituting the commission of these two crimes are separated by a substantial interval of time. In the absence of additional facts to support an inference that the two crimes are related we think the Special Inquiry Officer was required to find, as he did, that Costello had been convicted of two crimes "not arising out of a single scheme of criminal misconduct." This is enough to dispose of this phase of the case, and it appears to be the reasoning adopted by the First and Ninth Circuits. *Chanan Din Khan* v. *Barber*, 9 Cir., 1958, 253 F. 2d 547, 549, cert. denied, 357 U. S. 920; *Fitzgerald ex rel. Miceli* v. *Landon*, 1 Cir., 1956, 238 F. 2d 864, 867.

Concededly Costello, when he filed his joint income tax return for the year 1948, was under a definite obligation to file an accurate and truthful return disclosing his income and that of his wife for that year. With respect to that year the only scheme of criminal misconduct discernible in this record is the single scheme to evade the payment to the Government of the income taxes justly due and payable for that year by filing a false and inaccurate return. Similarly, when he filed his income tax return for the year 1949, he was under a definite obligation to file an accurate and truthful return disclosing his income and that of his wife for that year. Here again the only scheme of criminal misconduct discernible in this record is the single scheme to evade the payment of the income taxes justly due and payable for the year 1949. There is no connection whatever between the two. A finding that the two convictions were of crimes "arising out of a single scheme of criminal misconduct" would not only have been clearly erroneous, it would have been without a scintilla of evidentiary support. Moreover, the circumstance that the Government proved its case against Costello by the "net-worth method" is wholly immaterial.

Much as we are tempted to discuss the theories advanced in a number of decisions by various courts with respect to the meaning of the phrase "single scheme of criminal misconduct," we think the exercise of a proper judicial restraint makes it undesirable for us to reach out and now decide more than the circumstances of this case require us to decide. We would not wish, however, to be thought to subscribe to the views expressed in the cases collected in footnote [8]. The statute makes no reference whatever to any "common scheme or plan"; nor would it seem reasonable to suppose that the Congress intended to grant immunity from deportation to those who over a period of time pursued a course of criminal misconduct, involving numerous successive, separate crimes, consummated at different times but in the same manner, or with the same associates, or even by the use of the same fraudulent devices, disguises, tools or weapons. Nor, in the case of successive bank robberies at different times and places, for example, would it seem that these could be said to have arisen out of a single rather than two separate schemes of criminal misconduct, simply because the robbers, prior to the first robbery, had in mind and had discussed the robbery of the second bank after the hue and cry over the first robbery had subsided. After all there is no denying the fact that the Congress by the 1952 Act intended to make it easier rather than more difficult to deport aliens who were recurrent criminals. But this is by the way.

III

The contention that crimes of income tax evasion do not involve moral turpitude need not long detain us. Costello's brief leads us into a labyrinth of technical rulings

---

[8] *Jeronimo* v. *Murff*, S. D. N. Y., 1957, 157 F. Supp. 808, 813; *Zito* v. *Moutal*, D. C. Ill., 1959, 174 F. Supp. 531, 535; *Barrese* v. *Ryan*, D. C. Conn., 1962, 203 F. Supp. 880, 884. See also *Wood* v. *Hoy*, 9 Cir., 1959, 266 F. 2d 825, 829.

in a great variety of supposedly analogous situations. But the plain fact remains that Costello was charged with the offenses of "wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife" for the years 1948 and 1949, by the filing of "false and fraudulent returns," and he was adjudged guilty as charged. The statute pursuant to the terms of which Costello was twice convicted, is as above stated Section 145(b) of the Internal Revenue Code of 1939. The crimes consist of "wilfully" attempting in any manner to evade or defeat any tax imposed by the Act of which Section 145(b) is a part. There can be no "wilful" evasion without a specific intent to defraud. *United States* v. *Martell*, 3 Cir., 1952, 199 F. 2d 670. Accordingly, we hold the two convictions are of crimes involving moral turpitude. *Jordan* v. *De George*, 1951, 341 U.S. 223. An alien who is permitted to enter this country and to enjoy the blessings of freedom under the Constitution and laws of the United States, and who wilfully evades or attempts to evade the payment of his fair share of the taxes needed to support our Government is surely engaged in conduct involving moral turpitude.

Petition dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,048

STANLEY SAWKOW, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS, UNITED STATES DEPARTMENT OF JUSTICE.

Argued December 3, 1962

Before BIGGS, *Chief Judge,* and STALEY, *Circuit Judge,* and LEAHY, *District Judge.*

Opinion of the Court

(Filed January 29, 1963)

By STALEY, *Circuit Judge.*

Petitioner has been ordered deported by the Board of Immigration Appeals. The order is based on the Board's conclusion that he is an alien who subsequent to his entry into this country was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. 8 U.S.C.A. § 1251(a)(4).

The original deportation charges were preferred against the alien on August 10, 1960, but due to various adjournments and a reopening of the proceedings, the hearing giving rise to this petition did not take place until

September 27, 1961. In the interim various additional charges were lodged by the respondent, but for the purposes of this petition we are concerned with only four charges in all. We deem it advisable at this point to outline the New Jersey criminal actions which formed the basis for them.

(1) Indictment No. 27-59 (robbery of the person on February 13, 1959).

(2) Accusation 85-60 (robbery of the person on February 13, 1959).

(3) Indictment No. 30-58 (receipt of stolen automobile on July 17, 1958).

(4) Indictment No. 31-58 (theft of automobile on July 18, 1958).

The record reveals that with respect to (1) petitioner was sentenced on April 14, 1960, following his plea of *non vult*.[1] However, on November 2, 1960, the sentencing judge vacated this plea together with the sentence which he had imposed. This was done pursuant to N.J.R.R. 3:7-10(a), which provides:

> "A motion to withdraw a plea of guilty or of *nolo contendere* or of *non vult*, may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea."

On February 20, 1961, the state prosecuting officials filed (2), charging petitioner with the same overt act. On March 30, 1961, he was sentenced on his plea of *non vult* to this accusation, the state court making a specific recommendation that he should not be deported. On the same day the indictment for (1) was dismissed. With respect to (3)

---

[1] According to Black's Law Dictionary (Fourth Edition), *non vult* is a variation of the form *nolo contendere*.

and (4), sentences to concurrent indeterminate terms at the New Jersey State Reformatory followed similar *non vult* pleas and were suspended.

The special inquiry officer reasoned that because the state court had jurisdiction both to set aside the judgment of conviction on (1) and to thereafter dismiss the proceedings, this charge could not be used as a basis for deportation. He reached the same conclusion with respect to (2) because he found that the recommendation against deportation was binding.[2] The officer further held that the respondent had failed to introduce substantial evidence to meet its burden of proof that the crimes charged in (3) and (4) did not arise out of a single scheme of criminal misconduct. On appeal the Board found that the purpose of the state court in vacating the plea and conviction on (1) was to repair the omission to make the statutory recommendation against deportation, and concluded that because of this the recommendation made in (2) was ineffective. It further concluded that (3) and (4) did not arise out of a single scheme of criminal misconduct. Accordingly, the decision of the special inquiry officer was reversed and the alien was ordered deported to Poland.

In this court petitioner for the first time argues that a sentence entered on a plea of *non vult* is not a conviction for

---

[2] "1251. Deportable aliens—general classes

* * *

"Nonapplicability of subsection (a)(4)

"(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply * * * (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. * * *" 8 U.S.C.A. § 1251(b).

deportation purposes. Similarly, he contends that he was never convicted within the meaning of the statute because he was sentenced to confinement at the New Jersey State Reformatory. His failure to present these contentions before the Board would ordinarily preclude him from raising them at this juncture. 8 U.S.C.A. §1105(a)(4); Yee Si v. Boyd, 243 F.2d 203, 207 (C.A. 9, 1957); cf. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952). However, because we hold that he is not deportable on other grounds, we will assume, *arguendo*, that he was convicted for the purposes of the immigration law.

Petitioner's more fundamental contentions are that the conviction under (2) cannot be use as a foundation for deportation, and that respondent failed to sustain its burden to establish that (3) and (4) did not arise out of a single scheme of criminal misconduct. We agree.

Respondent concedes that a recommendation against deportation made in conformity with the statute at the time of first imposing sentence precludes the use of the conviction in a deportation proceeding. It urges, however, that if a judgment of conviction is vacated for the purpose of avoiding deportation, a subsequent recommendation is ineffectual. This argument misses the mark, for no contention is made that the state court either exceeded its jurisdiction or abused its discretion in vacating the plea of *non vult* together with the judgment of conviction, and subsequently dismissing the indictment. Thus, the action of the state court is concededly valid. That being so, the original judgment is as much a nullity as if the grand jury had never returned an indictment. Obviously, Congress by the use of the phrase "at the time of first imposing judgment or passing sentence" was referring to a valid sentence. Here, the first valid sentence for the robbery committed on February 13, 1959, was imposed on March 30, 1961. At that time a recommendation against deportation was made after prior notice had been given to the respondent which opposed it.

Hence, that conviction cannot be used as a basis for deportation.

Further support for our conclusion is found in Giammario v. Hurney, — F.2d —, (C.A.3, 1962) (slip opinion, p. 4). We there held that a judgment of conviction precludes us from considering anew the issue of an alien's guilt. The same considerations of policy and the orderly administration of justice which underlie that holding apply here with equal cogency to an attack upon an admittedly valid order vacating a judgment of conviction.

Respondent places great reliance upon U.S. ex rel. Piperkoff v. Esperdy, 267 F.2d 72 (C.A.2, 1959). Insofar as that case holds that the time of first imposing judgment or passing sentence was not the time of the original sentencing but that of the first *coram nobis* proceeding vacating the original conviction, it would appear to support our conclusion. Moreover, as pointed out by the special inquiry officer, there is a basic and controlling distinction between that case and what occurred here. In the former, there was a new trial in the same cause after the original judgment was vacated. In the instant case, the original judgment of conviction was vacated. Thereafter, the state, in its discretion, filed a new accusation, and the original indictment was dismissed. Although the factual basis for the accusation was the same as for the original indictment, it nonetheless gave rise to a new, separate and distinct criminal proceeding.[3]

---

[3] Respondent also cites U.S. ex rel. Klonis v. Davis, 13 F. 2d 630 (C.A. 2, 1926); Ex parte Eng, 77 F. Supp. 74 (N.D. Cal., 1948); United States v. Esposito, 67 F. Supp. 770 (E.D.N.Y., 1946); and U.S. ex rel. Arcara v. Flynn, 11 F. 2d 899 (W.D.N.Y., 1926). These cases are clearly inapposite. In none of them was the original judgment of conviction vacated. Rather, each involved a belated attempt to obtain a recommendation against deportation long after the original judgment.

The sole question remaining is whether there is reasonable, substantial, and probative evidence to support the Board's conclusion that (3) and (4) did not arise out of a single scheme of criminal misconduct. 8 U.S.C.A. §§ 1105 (a)(4), 1252(b)(4). Of course, any doubt in the interpretation of the statute must be resolved in favor of the alien because of the drastic consequences of deportation. Barber v. Gonzales, 347 U.S. 637, 642 (1954); Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); Holzapfel v. Wyrsch, 259 F.2d 890, 893 (C.A.3, 1958). Additionally, we note that it is just as much the burden of the respondent to establish that the two crimes did not arise out of a single course of criminal misconduct as it is to prove that the alien was convicted of two crimes. Wood v. Hoy, 266 F.2d 825, 831 (C.A. 9, 1959). We think that on the record before us there is a lack of substantial evidence to support the Board's conclusion.

Petitioner did not testify on this point, and the only evidence introduced by the respondent was the record of convictions, including the indictments. These reveal convictions, as heretofore indicated, of the receipt of a stolen motor vehicle on July 17, 1958, and the theft of another vehicle belonging to a different person on the following day, July 18, 1958. Both offenses were committed in Bayonne, New Jersey. The Board, citing, inter alia, Wood v. Hoy, supra, held that the inference to be drawn from different crimes committed at different times against different persons is that they were separate and distinct unless there is evidence to the contrary. Conceding the validity of this proposition, we think its application to the facts of this case compels the opposite conclusion. The crimes for which petitioner was convicted are of the same nature and were committed within an interval of, at the very most, a day. In these circumstances, what was stated in Wood v. Hoy, 266 F.2d at 831, is fully applicable to the instant case:

> "It may be that in some cases the proof of the commission of two crimes may by the very nature of the

crimes themselves, or the time or circumstances of their commission, be reasonable, substantial and probative evidence that they did not arise out of a single scheme of criminal misconduct. We do not say that is not possible. However, that is not this case. * * * "

Indeed, in that case there was a three-day interval between the commission of the two offenses. For all we know from the record before us these crimes may have been perpetrated within a few minutes of each other. The test of substantial evidence is not met by evidence which gives equal support to inconsistent inferences. NLRB v. Shen-Valley Meat Packers, Inc., 211 F.2d 289, 293 (C.A.4, 1954); Zito v. Moutal, 174 F. Supp. 531 (N.D.Ill., 1959). The burden was upon the respondent to prove that the two critical acts were not part of "a single scheme of criminal misconduct." It has not met this burden.

The order of the Board will be reversed and the cause remanded with directions to terminate the deportation proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	3
Conclusion	11

CITATIONS

Cases:

Brancato, United States ex rel. v. *Lehman*, 239 F. 2d 663	4
Costello v. *United States*, 350 U.S. 359	2
Costello v. *United States*, 365 U.S. 265	2
Eichenlaub, United States ex rel. v. *Shaughnessy*, 338 U.S. 521	5
Gubbels v. *Hoy*, 261 F. 2d 952	7
Jordan v. *De George*, 341 U.S. 223	11
Khan v. *Barber*, 253 F. 2d 547, certiorari denied, 357 U.S. 920	10
Lehmann v. *United States ex rel. Carson*, 353 U.S. 685	5
Mangaoang v. *Boyd*, 205 F. 2d 553	5, 6
Myres v. *United States*, 174 F. 2d 329, certiorari denied, 338 U.S. 849	8
Resurreccion-Talavera v. *Barber*, 231 F. 2d 524	6
United States v. *Croessant*, 178 F. 2d 96, certiorari denied, 339 U.S. 927	8
United States v. *Martell*, 199 F. 2d 670	11
United States v. *Rosenblum*, 176 F. 2d 321, certiorari denied, 338 U.S. 893	11

680960—63

Statutes: Page

Espionage Act of 1917, 40 Stat. 217 5

Immigration Act of 1917, 39 Stat. 874, *et seq* 5

Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.*:

Section 101(a)(3) (8 U.S.C. 1101(a)) 4

Section 241(a) (8 U.S.C. 1251(a)) 2, 3, 4, 5, 6, 7, 8, 9

Section 242(b) (8 U.S.C. 1252(b)) 3, 6, 7

Miscellaneous:

H. Rep. No. 1365, 82d Cong., 2d Sess 7

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 882

FRANK COSTELLO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, pp. 48a–58a) is reported at 311 F. 2d 343.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1962. The petition for a writ of certiorari was filed on February 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an alien who has been divested of United States citizenship by reason of fraud

in its procurement, may be deported on the basis of convictions which occurred prior to such divestment.

2. Whether the convictions for evasion of income taxes in separate years were for offenses not arising out of a single scheme of criminal misconduct.

3. Whether wilful evasion of taxes is a crime involving moral turpitude.

STATUTE INVOLVED

Section 241(a) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. 1251(a), provides in pertinent part:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

STATEMENT

Petitioner, who was born in Italy, entered the United States as an alien in 1895 and was naturalized in 1925. In 1954, petitioner was convicted of having wilfully and knowingly attempted to defeat and evade the payment of income taxes by filing a false and fraudulent income tax return for the years 1948 and 1949. See *Costello* v. *United States*, 350 U.S. 359. In 1959, his citizenship was revoked because of fraud in its procurement. See *Costello* v. *United States*, 365 U.S. 265.

In 1961, proceedings were commenced to have petitioner ordered deported under Section 241(a)(4) of the Immigration and Nationality Act, as an alien who, subsequent to entry, had twice been convicted of "crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," *i.e.*, income tax evasion for the years 1948 and 1949. At the hearing, conducted pursuant to Section 242(b) of the Act, the government offered in evidence the record of the convictions. Petitioner declined to testify. He requested, however, that a subpoena be issued ordering the appearance of the attorney who had represented him at the income tax prosecution for the purpose of adducing evidence on the question of whether the income tax convictions "related to the crimes arising from a common scheme." This request was denied, the inquiry officer ruling that, since the attorney had not testified at the income tax trial, his testimony now would not be germane to the question of a "single scheme." Petitioner was given the opportunity to submit affidavits on the subject by the lawyer or anyone else, but declined to do so. The Special Inquiry Officer, upon the record before him, concluded that petitioner was deportable. The Board of Immigration Appeals sustained this order. A petition to the court of appeals for review of the deportation order was dismissed, the court holding that petitioner had properly been found deportable.

ARGUMENT

1. Petitioner contends (Pet. 11) that he was not deportable under Section 241(a)(4) of the Immigra-

tion and Nationality Act, *supra*, p. 2, because at the time he was convicted he was not an alien. In fact, however, petitioner was an alien when convicted. His naturalization was subsequently held to be void *ab initio* on the ground that it was procured by fraud.[1]

Furthermore, even if petitioner is considered to have been a citizen at the time of his conviction, Section 241(a)(4) still provides for his deportation. That section requires for deportability proof (1) that the person is an alien and (2) that, after entry, he had been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. Petitioner does not dispute the finding that he is an "alien" as that term is defined in Section 101(a)(3) of the Act and, that subsequent to his entry into the United States in 1895, he was convicted of wilful evasion of income taxes for the years 1948 and 1949.

Petitioner's claim that the statute applies only to persons who were aliens when convicted is incon-

[1] *United States ex rel. Brancato* v. *Lehman*, 239 F. 2d 663 (C.A. 6), is not inconsistent with this argument. There, the court was construing a provision of the Immigration Act of 1917 stating that an alien sentenced to a year or more for a crime involving moral turpitude committed within five years of entry shall be deportable. The court held that the particular statute meant by entry only persons who were then aliens, not persons who had been naturalized even though illegally. This case involves an entirely different statute which does not require for deportability that the convictions were within a certain period after entry. It is enough that the person be convicted at any time. And it is significant that *Brancato* did not hold that the convictions which occurred when the person was ostensibly a citizen did not come within the statute if they were within the statutory time period.

sistent with its clear words. Section 241(a)(4) specifically applies to any alien who "at any time after entry is convicted of two crimes involving moral turpitude." In terms, this provision applies whether or not the person was an alien when convicted. This view is strongly supported by this Court's decision in *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521. In *Eichenlaub* this Court held that a statute making deportable "[a]ll aliens who since August 1, 1914, have been or may hereafter be convicted" of violations of the Espionage Act of 1917, did not require that the offenders have the status of aliens at the time they were convicted. Petitioner's argument that *Eichenlaub* is inapplicable because the statute involved there used the phrase "have been * * * convicted" and Section 241(a)(4) uses the phrase "is convicted" is without merit. There is no substantial difference between these two phrases. Indeed, this Court has paraphrased Section 241(a)(4) as providing for "the deportation of an alien who 'at any time after entry' *has been* convicted of two crimes involving moral turpitude" (emphasis added). *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685, 689.[2]

---

[2] In *Mangaoang* v. *Boyd*, 205 F. 2d 553, 554 (C.A. 9), certiorari denied, 346 U.S. 876, the court of appeals held, as one of two grounds for decision, that a person born in the Philippines, who entered this country as a national and who was for a short time a member of the Communist Party, could not be deported after losing his American nationality by operation of law when the Philippines became independent in 1946. That case involved a section of the Immigration Act of 1917 providing for the deportability of "[a]liens who, at any time, shall be or shall have been members of any of the following classes: * * * (C)

Petitioner argues that, since he was not an alien at the time of his conviction, he could not take advantage of the provisions of Section 241(b)(2) of the Act, which provides that Section 241(a) shall not apply "if the court sentencing such alien for such crime shall make * * * a recommendation to the Attorney General that such alien not be deported." The answer to this contention is simply that it was petitioner's own act of fraudulently obtaining citi-

---

Aliens who are members of * * * the Communist Party of the United States." The court said that subsection (C) required that the person be an alien when a Party member. This follows from the fact that "alien" is used in the 1917 Act both to state what group of persons are subject to the deportation provisions and to state what acts must occur to be deportable. In contrast, Section 241(a)(4) uses "alien" only to state what persons are subject to the deportation provisions; the act justifying deportation is conviction of two crimes.

Resurreccion-Talavera v. *Barber*, 231 F. 2d 524, 525 (C.A. 9), involved a person who was also an American national by reason of birth in the Philippines and who was convicted of a crime involving moral turpitude. The court held he was deportable after he lost his American citizenship in 1946 because he "was convicted * * * prior to entry" of a crime involving moral turpitude. In reaching this decision, which is, of course, consistent with the holding below in this case, the court of appeals apparently distinguished *Mangaoang* v. *Boyd* on the ground that *Mangaoang* involved a statute applying to "aliens who *are* members of * * * the Communist Party" (emphasis in original) while *Resurreccion-Talavera* concerned a statute involving aliens who *were* convicted. We submit that this distinction of the *Mangaoang* case on the basis of the tenses of the verbs used is unnecessary (for the reasons stated with regard to the *Mangaoang* case) and erroneous.

The most that can be said as to these two cases is that they are to some extent inconsistent with one of two independent grounds relied on by respondent here. They do not relate at all to the ground that petitioner was an alien when convicted. And they involved entirely different statutes.

zenship that prevented him from taking advantage of Section 241(b)(2). The case of *Gubbels* v. *Hoy*, 261 F. 2d 952 (C.A. 9), which is cited by petitioner (Pet. 11), has no application here. There the court, in deciding that adjudication of guilt by a court martial was not a "conviction" within the meaning of Section 241(a)(4) of the Immigration and Nationality Act, gave, as one of the reasons for its conclusion, the fact that in such a situation there is no judge capable of making a recommendation under Section 241(b)(2). But a federal district judge, of course, may recommend a pardon for aliens. Petitioner's inability to ask for such relief because of his claim of citizenship stemmed entirely from his own fraud.

Congress clearly has the power to provide that a person presently an alien may be deported for past crimes, whatever his status when the crime was committed. The present statute was designed to broaden the grounds for exclusion and deportation of criminal aliens. H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), p. 28. It reflects a Congressional judgment that an alien who, after entry has been proved, by judicial conviction for two or more crimes, to be a member of the criminal class, should not continue to reside in the United States. Petitioner is just such an alien. He should not be treated differently from other aliens who commited similar crimes merely because he fraudulently managed to obtain citizenship.

2. Petitioner's conviction for wilful evasion of income taxes for the years 1948 and 1949 was a conviction of "two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," as that phrase is used in Section 241(a)(4) of the Immigration and Nationality Act. The evasion of income taxes by false returns in two successive years may or may not involve similar methods but, from the very nature of the crime, the evasion cannot be the result of a single scheme. Each return filed must necessarily state income and expenditures for a particular year, so that falsification for any one year must necessarily relate to events which did not take place the year before. Even though a person might plan to conceal income from the very same business in two separate years, he cannot, in one year, be certain what his income and expenditure will be in the next. Since returns must be filed yearly, the crime of willful evasion is fully complete when the return is filed for the year in question; the next year must necessarily involve different events and different calculations widely separated in time, whether or not the method of deception is similar to that used the year before. Consequently, the courts have held that the crime of wilfully and knowingly filing a false and fraudulent return intending to defeat or evade any part of the tax is not a continuing offense. *Myres* v. *United States,* 174 F. 2d 329, 334 (C.A. 8), certiorari denied, 338 U.S. 849; *United States* v. *Croessant,* 178 F. 2d 96, 98 (C.A. 3), certiorari denied, 339 U.S. 927.

The separateness of tax evasion for different years is clear whether or not the government undertakes to prove evasion by the "net worth" method. This is illustrated by the decision in petitioner's own case. Of the four years for which petitioner was tried (1946 to 1949), the jury acquitted as to the first. The court of appeals reversed as to the second year, because it was possible, on the "net worth" theory, that petitioner had sufficient cash reserves to account for the understated income before 1948, but not for the amount that would be necessary for 1948 and 1949. See 221 F. 2d 668, 671. The offenses relating to the last two years, of which petitioner was convicted, were likewise two separate and distinct crimes.

Congress certainly did not intend to grant immunity from deportation to those who over a period of time pursue a course of criminal misconduct, involving numerous successive, separate crimes which were consummated at different times, merely because the crimes may have been committed in the same manner, or with the same associates, or even by the use of the same fradulent devices. The government adquately showed conviction of two crimes not arising out of a single scheme when it showed that petitioner had been convicted by willful evasion by making false returns in two separate years. Even assuming that it is ever possible for false returns to be part of a single scheme, it would be up to petitioner to present evidence contradicting the *prima facie* case made by the fact of conviction for two separate years. Petitioner was not, as he claims, kept from making such showing

by the fact that the inquiry officer declined to issue a subpoena for his attorney at the income tax trial. No claim was made that the attorney would or could testify to the facts beyond those brought out at the trial. No affidavit was offered as to any facts although the opportunity was given to do so. In the petition here all that is claimed is that the lawyer would have given an analysis of the tax evasion case and the reasons for his trial strategy (Pet. 24). None of this would go to show that false returns filed a year apart were not separate and distinct acts. Petitioner did not have to endeavor to show a single scheme by his own testimony, but he did have to offer *facts* as distinct from legal argument. This he never attempted to do.

Decisions relied upon by petitioner (Pet. 13–19), involving different crimes based on different facts, cannot be deemed in conflict with the decision below. As to the particular question here, whether evasions of taxes by false returns in successive years, are separate crimes for the purposes of Section 241(a)(4) of the Immigration and Nationality Act, there is no conflict of decisions. To the contrary, the decision of the Ninth Circuit in *Kahn* v. *Barber,* 253 F. 2d 547, certiorari denied, 357 U.S. 920, is in full accord with the decision below.

3. To support the charge of wilfully and knowingly attempting to defeat and evade income taxes for the years 1948 and 1949 by filing false and fraudulent returns, the government was required by law to show that petitioner had a specific intention to evade

taxation tantamount to an intent to defraud. *United States* v. *Rosenblum*, 176 F. 2d 321, 329 (C.A. 7), certiorari denied, 338 U.S. 893; *United States* v. *Martell*, 199 F. 2d 670 (C.A. 3). Indeed, petitioner was specifically charged with and convicted of filing "false and fradulent income tax return[s]" (R. 95). Crimes in which fraud is proved as an ingredient of the offense are crimes involving moral turpitude. *Jordan* v. *De George*, 341 U.S. 223. Petitioner was therefore properly found to have been convicted of two crimes involving moral turpitude.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE P. MILLER,
Attorneys.

ROY BABITT,
Special Assistant to the
United States Attorney,
Southern District of New York.

APRIL 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963

LIBRARY
SUPREME COURT, U.S.

FILED
APR 9 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
1000 Hill Building
Washington 6, D. C.
Counsel for petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 882

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

The government argues, in opposition to certiorari, that, whatever be the construction of "alien . . . who . . . is convicted", as used in § 241(a)(4) of the Immigration and Nationality Act of 1952, petitioner is deportable because he "was an alien when convicted". Brief, pp. 4, 6n. The question of the alleged voidness *ab initio* of petitioner's naturalization was not referred to in the petition for certiorari because the court below, although the question was fully argued to it, saw fit to ignore it as a basis for approving the deportation

order. The holding below was that § 241(a)(4) applies to petitioner because he is now an alien, not that he was an alien at the time of the tax convictions.

In these circumstances, it is necessary for petitioner to reply to the government's assertion that his post-conviction denaturalization related back, for the purpose of deportation, to make him an alien at the time of the convictions.

The basis of the government's assertion is an importation into the deportation statute of the provision of § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. §.1451(a), under which petitioner was denaturalized in 1959, that the order of denaturalization "shall be effective as of the original date of" the naturalization order.

A somewhat similar argument had been urged by the government in *Mangaoang* v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876. The Philippine Independence Act of 1934 contained a provision that "for the purposes of . . . laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States *shall be considered as if they were aliens.*" (Emphasis supplied.) The government argued, therefore, that, for the purpose of the deportation provision of the Internal Security Act, Mangaoang should be considered as if he were an alien during the time that he was a member of the Communist Party. The court, in disposing of the government's contention, noted that the 1934 Act did not make Mangaoang an alien in 1938, but provided only that he was so to be considered for limited purposes. If he were to be deported, the court noted, it

would have to be by virtue of the Internal Security Act of 1950. The court said:

> "The question is whether the word 'aliens' in subdivision (C)—'Aliens who are members of . . . the Communist Party', includes not only aliens in the ordinary sense but was intended to be broad enough to include persons who were in reality nationals of the United States but who under the provisions of the Act of March 24, 1934 were to be 'considered as if they were aliens'.
>
> "If it be conceded that the word 'aliens' in the present Act [Internal Security Act of 1950] might possibly be given so broad a construction, *the most that could be said is that this possibility suggests an ambiguity.* There is nothing to show that when Congress enacted the Internal Security Act, it had in mind the very special case of the Filipinos described in the quoted section of the Act of March 24, 1934. Clearly we deal here with an Act which, if it were to apply to this appellant, would have a punitive impact. * * *
>
> "We think that the rule of strict construction should be applied to a statute having this impact, and that subdivision (C) above quoted must be construed to use the word 'aliens' in the ordinary sense and connotation, and not to include Filipinos who were for certain limited purposes to be 'considered as . . . aliens', under a section of a law long since obsolete and inoperative. We think therefore that the Act here in question did not authorize the appellant's deportation." 205 F. 2d at 556. (Emphasis supplied.)

The court held, in short, that though persons like Mangaoang, under the 1934 Act, were to be "considered as if they were aliens" for various purposes, they could not be so considered for deportation purposes.

The very same argument respondent makes here was also made in *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663 (6th Cir. 1956). In an opinion by Judge Miller, concurred in by Judge (now Mr. Justice) Stewart, the court said:

> "The Government's contention would require that we give the statute a relation-back construction. We have no difficulty in giving a retroactive effect *to the denaturalization order* in view of the authorities supporting such a ruling. But the Government has cited us no case from the Supreme Court or the U. S. Courts of Appeals which has gone the additional step and given such relation-back construction to the *deportation statute*. It was urged upon the Supreme Court in United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529, 70 S. Ct. 329, 94 L. Ed. 307, where the Court found that a ruling on the question was unnecessary for a disposition of the case. We think that the Court's later ruling in Barber v. Gonzalez, supra, 347 U.S. 637, 642, 74 S. Ct. 822, 98 L. Ed. 1009, indicates disapproval of a relation-back construction." 239 F. 2d at 666. (Emphasis supplied.)

That *Brancato* involved the first clause of § 241(a)(4) ["... a crime ... committed within five years after entry ..."], while the instant case involves the second clause ["... at any time after entry is convicted of two crimes ..."], does not, as the government contends (Brief, p. 4, n.1), impair *Brancato's* force here. What *Brancato* said of the inapplicability of the relation-back doctrine for deportation purposes was not directed to any particular ground of deportation but to "the deportation statute" generally.

If the relation-back doctrine were imported into the deportation statute, "the most that could be said,"

just as in *Mangaoang*, "is that this possibility suggests an ambiguity." And, again as in *Mangaoang*, "there is nothing to show that when Congress enacted [§ 241 (a)(4)], it had in mind the very special case of" an individual convicted of crimes long after naturalization and before denaturalization. The ambiguity resulting from importing into the deportation statute the relation-back concept of the denaturalization statute would have to be resolved here, just as it was in *Mangaoang*, in favor of the alien and against deportability.

The function of § 241(a)(4), as this Court said of the equivalent deportation provision of § 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended, "is to apprise aliens of the consequences which follow after conviction . . . of the requisite two crimes." *Jordan* v. *DeGeorge*, 341 U.S. 223, 230. And, though not a criminal statute, a deportation statute should be tested in the light of the "void for vagueness" doctrine. *Id.* at 230-231. As was said in *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 656-657 (9th Cir. 1962), *cert. granted*, 371 U.S. (Preliminary Print) 859, in striking down on due process grounds a deportation order based on a conclusion that homosexual conduct is included within "psychopathic personality" as used in § 212(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(4):

> "In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. [Citations omitted.] Or, as [otherwise] stated . . . , would persons of 'ordinary intelligence' be able to know what the statute means."

Surely petitioner cannot be said to have been on notice, when he filed the tax returns upon which he was convicted, that his 1925 naturalization was a nullity. Indeed, two of the eight Justices of this Court who ruled on his denaturalization were of the opinion that he held valid citizenship. *Costello* v. *United States*, 365 U.S. 265, 288. Section 241(a)(4) certainly does not apprise an individual who, for a quarter of a century, has been enjoying the rights and privileges of citizenship that, if he should be convicted of two crimes of a certain type, he would be subject to deportation. To inject that consequence into the deportation statute by reading into it the relation-back concept of the denaturalization statute needlessly imperils the former statute by introducing an element of vagueness which Congress did not place therein.

Moreover, to read into the deportation statute the relation-back concept of the denaturalization statute would eliminate the effect of § 241(b), which has been held to be an essential part of the legislative scheme. *Gubbels* v. *Hoy*, 261 F. 2d 952, 954 (9th Cir. 1958); see Petition herein, pp. 11-12. All persons treated as aliens for deportation purposes by application of the relation-back theory would automatically have been deprived of their opportunity to seek a recommendation of non-deportation. The intent of Congress that not all crimes involving moral turpitude should result in deportation, *Tutrone* v. *Shaughnessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958), would thus be thwarted.

The relation-back rule which respondent urges upon this Court goes beyond the position respondent itself has taken administratively in other cases. The Board of Immigration Appeals, while utilizing the relation-back concept from time to time, appears never to have

sought to apply it to make a deportation sanction retroactive under a statute written *in praesenti*. Thus the Board applied it in *Matter of P—*, 4 I. & N. Dec. 373 (1951), in sustaining a deportation under the counterpart of the present § 212(a)(9), which covers "aliens who *have been convicted* . . ." prior to entry. A similar application of the concept was made in *Matter of W—*, 5 I. & N. Dec. 764 (1954).

To use the relation-back concept to make § 241(a)(4) retroactive would seem inconsistent with the Board's own basic distaste for the concept. In *Matter of C—*, 3 I. & N. Dec. 275 (1948, approved by Attorney General 1950), the Board said, in reversing the deportation of an alien based on an entry without a visa while he was a naturalized citizen:

> "When respondent left the United States in August 1930 to visit in Europe and when he returned in June 1931, he was, both from a legal and from a factual point of view, an American citizen. As such he was not in any way subject to the immigration laws. He was free to cross our borders without restraint and without regard to any of the documentary requirements of the Immigration Act of 1924. . . .
>
> * * *
>
> "The theory of the Service . . . can be supported only through the use of the doctrine of relation back, a legal fiction at best. We do not think this legal fiction must be universally applied in every situation regardless of the particular circumstances involved. For example, we hardly think that a man in respondent's position who exercised his rights of citizenship prior to the cancellation of his certificate of naturalization could be punished for so acting even though, through the operation of the doctrine of relation back, he was an alien at the time he exercised those rights and even

> though his acts might be said to have been illegal. To us it seems unfair to seize upon a fiction to require respondent to have done that which was impossible of performance, namely, to present an immigration document at the time of his 1931 entry. 'Respect for law does not thrive on captious interpretations.' *Delgadillo* v. *Carmichael,* 92 L. Ed. Adv. Op. 69, 71 [332 U.S. 338 (1947)]. To construe the 1924 Act to require the impossible strikes us as a captious interpretation, an interpretation that we do not think Congress could have intended.'"*

So long as the Board was dealing with statutes framed in the past tense, the invocation of the relation-back doctrine was of relatively little materiality, for the statutes themselves were held to apply to present aliens who had pre-alienage convictions, quite apart from any relation-back doctrine. See *United States ex rel Eichenlaub* v. *Shaughnessy,* 338 U.S. 521; *Resurreccion-Talavera* v. *Barber,* 231 F. 2d 524 (9th Cir. 1956).

In its argument that § 241(a)(4) applies to petitioner although he was not an alien at the time of the convictions, the government, taking a phrase out of context from the opinion in *Lehmann* v. *United States ex rel. Carson,* 353 U.S. 685, 689, suggests that this Court has construed § 241(a)(4) to apply to an alien who *has been* convicted of two crimes. Brief, p. 5. In *Carson* the alien sought to be deported had *at all*

---

* Subsequently, the Board limited *Matter of C—* to deportation orders based on documentary charges, under the misapprenhension that such a limitation was required by this Court in *Eichenlaub*. See *Matter of P—*, 4 I. & N. Dec at 375. But *Eichenlaub* compelled no such limitation, since it avoided any approval of the relation-back doctrine. See *United States ex rel Brancato* v. *Lehmann,* 239 F. 2d at 666.

times been an alien. There was no issue relating to concurrence *vel non* of alienage and convictions. The issue before the Court was whether a twice-convicted alien who was non-deportable under the provisions of the pre-1952 deportation statute became deportable when § 241(a)(4) was enacted in 1952. The Court held that the alien did become deportable in 1952. Nothing in the opinion suggested that he would be deportable if he had not been an alien at the time of his convictions. All that the Court said in the language relied on by the government is that one who, before 1952, has fulfilled the conditions of deportability prescribed by the 1952 Act, may be deported. Those conditions, we argue (and nothing in *Carson* is to the contrary), are the concurrence of alienage and convictions. In using the past tense form "has been convicted", the Court only meant, as is clear from the context, that the 1952 deportation provision could apply even though the conditions of deportability occurred before 1952.

It is submitted, in the light of the foregoing, (1) that § 241(a)(4) unambiguously excludes petitioner from the class of deportables, because he was not an alien when convicted of tax evasion; (2) that, even if there were ambiguity in subsection (a)(4) of § 241, subsection (b) of the same section and the principle of *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, would resolve the ambiguity against deportability; (3) that there is, therefore, no occasion to read into § 241(a)(4) the provisions of an entirely separate and unrelated statute governing denaturalization; and (4) that, even if the relation-back provision of the denaturalization statute were imported into § 241(a)(4), it could do no more than introduce an ambiguity which would, in any case,

have to be resolved against deportability under the principle of *Fong Haw Tan*.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
1000 Hill Building
Washington 6, D. C.
Counsel for petitioner

LIBRARY
SUPREME COURT, U. S.

FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

EDWARD BENNETT WILLIAMS,
HAROLD UNGAR,
1000 Hill Building
Washington 6, D. C.
Counsel for Petitioner

PRINTED BY BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	3
Summary of Argument	4
Argument	7
I. Sec. 241(a)(4) Does Not Authorize Deportation of an Alien for Convictions Occurring While He Was a Naturalized Citizen	7
A. Eichenlaub Does Not Support the Order Here Under Review	8
B. Congress Expressed No Intent in § 241(a)(4) to Authorize Deportation of Denaturalized Persons for Convictions Occuring During Citizenship	12
C. Subsection (b) of § 241, Read Together With Subsection (a)(4), Shows That Congress Did Not Intend to Authorize Deportation of Denaturalized Persons for Convictions Occurring During Citizenship	20
II. Petitioner's Denaturalization Did Not Relate Back to the Date of His Naturalization to Make Him Deportable Under § 241(a)(4) as One Who Was an Alien at the Time of His Convictions	25
Conclusion	36

TABLE OF AUTHORITIES

CASES: Page

Ablett v. *Brownell*, 240 F. 2d 625 (D.C. Cir. 1957) 17
Alcantra, United States ex rel. v. *Boyd*, 222 F. 2d 445 (9th Cir. 1955) 17
Bolter, In re, 66 F. Supp. 566 (S.D. Cal. 1946) 31
Barber v. *Gonzales*, 347 U.S. 637 17
Battaglino v. *Marshall*, 172 F. 2d 979 (2d Cir. 1949) ... 26
Bonetti v. *Rogers*, 356 U.S. 691 17
Brancato, United States ex rel. v. *Lehmann*, 239 F. 2d 663 (6th Cir. 1956) 6, 10, 17, 26, 27, 35
C——; Matter of, 3 I.&N. Dec. 275 (Board of Immigration Appeals 1948, approved by Attorney General 1950) 34, 35
Costello v. *United States*, 365 U.S. 265 .....4, 11, 23, 33
De Luca, United States ex rel. v. *O'Rourke*, 213 F. 2d 759 (8th Cir. 1954) 17
Eichenlaub, United States ex rel. v. *Shaughnessy*, 338 U.S. 521 .....5, 6, 8, 10, 12, 13, 14, 16, 24, 33, 35
Findan, In re, 4 F. Supp. 189 (D.R.I. 1933) 31
Fleuti v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 32
Fong Haw Tan v. *Phelan*, 333 U.S. 6 ..6, 7, 16, 17, 20, 24, 29
Fong Yue Ting v. *United States*, 149 U.S. 698 24
Giglio, United States ex rel. v. *Neelly*, 208 F. 2d 337 (7th Cir. 1953) 17
Gubbels v. *Hoy*, 261 F. 2d 952 (9th Cir. 1958) 5, 17, 21, 22, 24, 30
Holzapfel v. *Wyrsch*, 259 F. 2d 890 (3d Cir. 1958) 17
Jeronimo v. *Murff*, 157 F. Supp. 808 (S.D.N.Y. 1957) .. 17
Johannessen v. *United States*, 225 U.S. 227 26
Jordan v. *DeGeorge*, 341 U.S. 223 32
Kaloudis, United States ex rel. v. *Shaughnessy*, 180 F. 2d 489 (2d Cir. 1950) 24
Lehmann v. *United States ex rel. Carson*, 353 U.S. 685 .....18, 19
M——, Matter of, A-11875663, Int. Dec. 1169 (Board of Immigration Appeals, July 16, 1961) 13
Mangaoang v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876 .....5, 6, 7, 10, 13, 14, 15 16, 17, 27, 29, 30, 35

Page

Marks, Application of, 198 F. Supp. 40 (S.D.N.Y. 1961) 13
Marks v. *Esperdy,* 205 F. Supp. 389 (S.D.N.Y. 1962), *rev'd on other grounds,* 315 F. 2d 673 (2d Cir. 1963) 13
Mirabal-Balon v. *Esperdy,* 188 F. Supp. 317 (S.D.N.Y. 1960) 17
P——, Matter of, 4 I.&N. Dec. 373 (Board of Immigration Appeals, 1951) 13, 33, 35
Resurreccion-Talavera v. *Barber,* 231 F. 2d 524 (9th Cir. 1956) 12, 13, 14, 15, 33
Rosenberg v. *United States,* 60 F. 2d 475 (3d Cir. 1932), *cert. denied,* 287 U.S. 645 26
S——, Matter of, 5 I.&N. Dec. 678 (Board of Immigration Appeals, 1954) 13, 15
Tutrone v. *Shaughnessy,* 160 F. Supp. 433 (S.D.N.Y. 1958) 17, 24, 30
United States v. *Carrollo,* 30 F. Supp. 3 (W.D. Mo. 1939) 11
United States v. *Costello,* 275 F. 2d 355 (2d Cir. 1960) 4
United States v. *Costello,* 221 F. 2d 668 (2d Cir. 1955), aff'd, 350 U.S. 359 3
United States v. *Stephan,* 50 F. Supp. 445 (E.D. Mich. 1943) 23
W——, Matter of, 5 I.&N. Dec. 759 (Board of Immigration Appeals, 1954) 13, 34

STATUTES:

Act of May 10, 1920, § 1, 41 Stat. 593, ch. 174 8

Immigration Act of 1917, § 19(a), 39 Stat. 874, 889 32

Immigration and Nationality Act of 1952:

§ 212(a)(4), 8 U.S.C. § 1182(a)(4) 32
§ 212(a)(9), 8 U.S.C. § 1182(a)(9) 13, 15, 19, 33
§ 241(a)(1), 8 U.S.C. § 1251(a)(1) 20
§ 241(a)(4), 8 U.S.C. § 1251(a)(4) 2, 4, 5, 6, 7, 8, 10, 12, 16, 18, 19, 20, 21, 22, 24, 25, 26, 27, 29, 30, 32, 33, 34, 36
§ 241(a)(7), 8 U.S.C. § 1251(a)(7) 17
§ 241(a)(11), 8 U.S.C. § 1251(a)(11) 18, 19
§ 241(a)(12), 8 U.S.C. § 1251(a)(12) 18

Page

§ 241(a)(15), 8 U.S.C. § 1251(a)(15) 18
§ 241(a)(16), 8 U.S.C. § 1251(a)(16) 18
§ 241(b), 8 U.S.C. § 1251(b) 2, 5, 20, 21, 22, 23, 24, 25, 30
§ 340(a), 8 U.S.C. § 1451(a) 6, 7, 25, 26, 30
§ 340(e), 8 U.S.C. § 1451(e) 30
§ 340(f), 8 U.S.C. § 1451(f) 30
§ 340(h), 8 U.S.C. § 1451(h) 30

Internal Security Act of 1950, § 22, 64 Stat. 1006 ....13, 28
Philippine Independence Act of 1934, § 8(a)(1), 48 Stat. 462 .....28, 30
5 U.S.C. § 1040 1
8 U.S.C. § 1105a (1961 Supp.) 1
28 U.S.C. § 1254(1) 1

MISCELLANEOUS:

2 Am. Jur., *Aliens*, §§ 1-64 32

Analysis of S. 716, 82d Cong., 1st Sess. (1951), vol. 4 of Supreme Court Library compilation of legislative history of the Immigration and Nationality Act of 1952, pp. 241-2 through 241-4 30

Analysis of S. 3455, 81st Cong., 2d Sess. (1950), vol. 5 of Supreme Court Library compilation of legislative history of the Immigration and Nationality Act of 1952, pp. 241-3 through 241-6 30

Besterman, *Commentary on the Immigration and Nationality Act*, 8 U.S.C.A., Part I, pp. 1-91 30

H. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 29, 31

H. Rep. No. 2096 (Conf. Rep.), 82d Cong., 2d Sess. (1952) 29

S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 29, 31

S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 29, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 126-35) is reported at 311 F. 2d 343.

JURISDICTION

The judgment of the Court of Appeals was entered December 4, 1962 (R. 136). Certiorari was granted April 22, 1963 (R. 137). The jurisdiction of this Court rests on 8 U.S.C. § 1105a (1961 Supp.), 5 U.S.C. § 1040 and 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the provision of § 241 (a)(4) of the Immigration and Nationality Act of 1952 for deportation of an "alien . . . who at any time after entry is convicted of two crimes" applies to an individual who was a naturalized citizen when convicted.

STATUTE INVOLVED

Section 241 (a)(4) and (b) of the Immigration and Nationality Act of 1952, 66 Stat. 204, as amended, 8 U.S.C. § 1251 (a)(4) and (b), provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> "(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * * *
>
> "(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty

days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."

STATEMENT

Petitioner was born in Italy on January 6, 1891, and was brought to the United States at the age of four (R. 43). He has resided here for over sixty-eight years, his only absence from this country being a short visit to Mexico in 1948 (R. 43, 59). Petitioner is married to a United States citizen (R. 59). In 1925 he himself became a citizen of the United States by an order of naturalization issued by the United States District Court for the Southern District of New York (R. 43).

In 1954 petitioner was convicted of separate counts of attempting to defeat and evade income taxes for the years 1948 and 1949[1] (R. 48). His naturalization was cancelled by order of the United States District Court for the Southern District of New York on March 9, 1959 (R. 43), which order was subsequently affirmed by the Court of Appeals for the Second Cir-

[1] The prosecution was based on the net worth-expenditure theory (R. 99-101). The original conviction was on three counts, for the years 1947 through 1949. On appeal the conviction on the 1947 count was reversed and the other two affirmed. *United States* v. *Costello*, 221 F. 2d 668 (2d Cir. 1955), *affirmed*, 350 U.S. 359.

cuit[2] and, on February 20, 1961, by this Court.[3] The ground upon which the revocation of petitioner's citizenship was sustained was that, in giving his occupation as "real estate," he was guilty of a "willful misrepresentation", because his real occupation was bootlegging and he "only dabbled in real estate". *Costello* v. *United States*, 365 U.S. 265, 277.

After this Court affirmed petitioner's denaturalization, the Immigration and Naturalization Service of the Department of Justice instituted proceedings to deport him. On June 21, 1961, the Service's Special Inquiry Officer, after a hearing, ordered petitioner to be deported under the second part of § 241 (a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251 (a)(4),[4] as an "alien . . . who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . ." (R. 42-62). Petitioner's appeal from this order was dismissed by the Board of Immigration Appeals on January 2, 1962 (R. 65-90). Petitioner then sought review in the court below, which, on December 4, 1962, dismissed his petition for review, holding that § 241 (a)(4) applies to petitioner even though he was a citizen when convicted (R. 126-35).

SUMMARY OF ARGUMENT

The court below held, with respect to the question here involved, that § 241 (a)(4) permits deportation of a person who is now an alien, even though, at the time of the convictions, he was a naturalized citizen. The government had supported the deportation upon

---

[2] *United States* v. *Costello*, 275 F. 2d 355 (2d Cir. 1960).

[3] *Costello* v. *United States*, 365 U.S. 265.

[4] Hereinafter referred to as "§ 241 (a)(4)."

a second ground as well: that, by virtue of the relation-back of his denaturalization to the date of his naturalization, petitioner was actually an alien at the time of the convictions. The court below did not decide the validity of this second ground. The government, however, still presses it.[5] Petitioner will therefore argue both grounds.

Section 241 (a)(4), by its plain terms, authorizes deportation only of aliens who were aliens when they were convicted. It is, in this respect, significantly different from the statute involved in *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, which permitted deportation of an alien who had been a citizen when convicted; and it is significantly similar to the statute involved in *Mangaoang* v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876, which was held not to permit deportation of an alien who had been a national of the United States when the asserted ground of deportability occurred. By reading "is" to mean "has been" the court below has distorted the ordinary meaning of subparagraph (4) of § 241 (a); it has attributed to Congress an intent not expressed in that subparagraph and negated by the use of past-tense language in various other subparagraphs of § 241 (a); and it has ignored the legislative design that § 241 (a)(4) not be applicable to aliens who could not have availed themselves of the § 241 (b) provision for recommendation of non-deportation. *Gubbels* v. *Hoy*, 261 F. 2d 952 (9th Cir. 1958). The authorities relied on by the government to support its reading of § 241 (a)(4) are inapposite, because all of them, like *Eichenlaub*, involve statutes using past-tense language, unlike the present-tense language of § 241 (a)(4).

[5] See Brief in Opposition, pp. 4 and 6, n.

Even if § 241 (a)(4) cannot be read as clearly requiring convictions during alienage as a ground of deportability, it certainly cannot be read as clearly permitting deportation for convictions occurring during citizenship. To the extent that there is such an ambiguity, this Court's approach to deportation provisions would require resolution of the ambiguity in favor of petitioner. *Fong Haw Tan* v. *Phelan,* 333 U.S. 6.

If, as we submit, § 241 (a)(4) authorizes deportation only for convictions during alienage, the judgment below must be reversed. The government's contention, not relied on by the court below, that petitioner was actually an alien when convicted, because denaturalization relates back to the date of naturalization, is untenable. Although the relation-back the government relies on is that provided by § 340(a) of the Immigration and Nationality Act of 1952, the concept was not created by that statute. It was generally applied by the courts, prior to the 1952 Act and without statutory mandate, to affect derivative citizenship based on revoked naturalization. The government's efforts to apply the concept to affect deportation were rejected in *Mangaoang* v. *Boyd, supra,* and in *United States ex rel. Brancato* v. *Lehmann,* 239 F. 2d 663 (6th Cir. 1956). This Court, when the government pressed the point, did not decide it. *Eichenlaub, supra,* 338 U.S. at 529-30.

There is absolutely nothing in the denaturalization statute or the legislative history thereof to show an intent of Congress to affect deportability on a relation-back theory. Indeed, such evidence as there is in the denaturalization statute and its history shows that Congress intended to affect nothing but claims of

derivative citizenship. Moreover, if § 340(a) were construed as affecting deportability, there would be introduced into § 241 (a)(4) an ambiguity which, under the principle of *Fong Haw Tan, supra,* would be resolved against deportation. See *Mangaoang* v. *Boyd,* 205 F. 2d at 556.

ARGUMENT

I. SEC. 241 (a)(4) DOES NOT AUTHORIZE DEPORTATION OF AN ALIEN FOR CONVICTIONS OCCURRING WHILE HE WAS A NATURALIZED CITIZEN

Sec. 241 (a)(4) permits the Attorney General to deport an "*alien* . . . who at any time after entry *is* convicted of two crimes" of a specified type.[6] The convictions relied on to support the instant deportation order occurred almost thirty years after petitioner's naturalization as a United States citizen and about five years before his citizenship was revoked. Petitioner claims, therefore, that he is non-deportable under the plain language of the statute—"alien . . . who is convicted . . .," since that language permits deportation only of one who was an alien at the time of the convictions.

The government's contrary contention and the holding below are based on two assertions:

> (a) That by using the word "is" Congress used "the most comprehensive word that could have been used" (R. 129), so that "is" should be read to include "has been" and, therefore, to embrace one who is now an alien if, at any time after his original entry, he has been convicted.

[6] Emphasis supplied.

(b) That *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, "strongly supports the Government view" (R. 129).

Because of the heavy reliance upon *Eichenlaub* both by the government and by the court below, we shall address our argument first to the effect of that decision upon the case at bar. Then we shall show that the interpretation of § 241 (a)(4) advanced by the government and accepted below is erroneous.

A. Eichenlaub Does Not Support the Order Here Under Review

The statute involved in *Eichenlaub* was § 1 of the Act of May 10, 1920, 41 Stat. 593, ch. 174, which authorized deportation of "aliens who since August 1, 1914, have been or may hereafter be convicted of" certain specified crimes. The question before the Court was whether an individual who had been a naturalized citizen when convicted and was subsequently denaturalized for fraud could thereafter be deported under that statute. The Court held by a majority of four to three that he could.

The dissent,[7] relying on the long line of authority calling for narrow interpretation of provisions for deportation,[8] was of the view that the Court should not "squeeze the Act of May 10, 1920, . . . so as to yield every possible hardship of which its words are susceptible." 338 U.S. at 533. Mr. Justice Frankfurter wrote:

---

[7] By Justice Frankfurter, concurred in by Justices Black and Jackson.

[8] See cases cited, 338 U.S. at 533.

> "I am aware of the fact that we are dealing here with a person whose citizenship has been taken from him. I maintain, however, that the rigorous statute permitting deportation of an 'alien' should be read to apply only to one who was an alien when convicted and should not be made to apply to persons in the position of these petitioners." 338 U.S. at 534.

The Court's majority of four, however, found that deportation was authorized by "the ordinary meaning of" the language employed by Congress. 338 U.S. at 527. The language to which the majority referred, as shown by the emphasis given it in the opinion, was the tense of the verb employed by Congress. The Court said:

> "The statutory language which says that 'aliens who since August 1, 1914, *have been or may hereafter be convicted . . .*,' (emphasis supplied)[*] refers to the requirement that the deportations be applicable to all persons who had been convicted of certain enumerated offenses since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920." 338 U.S. at 530.

In other words, the majority read, from the emphasized language, an unambiguous intent of Congress that one who was an alien at the time of the deportation order and who, since August 1, 1914, had been convicted of one of the specified crimes should be deportable, even though he had been a naturalized citizen at the time of the conviction. The Court's holding is thus limited to the language of the statute before it

---

[*] By the Court.

and does not purport to govern statutes providing for deportation of "aliens who *are* members of . . . the Communist Party," *Mangaoang* v. *Boyd*, 205 F. 2d 553, 555 (9th Cir. 1953), *cert. denied*, 346 U.S. 876; or an "alien who . . . *is* sentenced to imprisonment . . . ." *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666-67 (6th Cir. 1956).[10]

The conclusion below that *Eichenlaub* "strongly supports" a construction of § 241 (a)(4)—"alien . . . who . . . is convicted"—to permit deportation of one who was a citizen when convicted is, therefore, unfounded. In reaching that conclusion, moreover, the court below ignored the danger signals raised in the *Eichenlaub* dissent. Certainly it cannot be said of this statute, as the *Eichenlaub* majority said of the statute there involved, that Congress had expressed a clear intent to lump all denaturalized persons together and deport them for convictions occurring while they were citizens. Mr. Justice Frankfurter, finding no such clear intent in the *Eichenlaub* statute, went on to say:

> "If and when the Congress gives the matter thought it may well draw distinctions between one who was an alien and one who was naturalized at the time of conviction, based on the manner in

[10] In *Brancato*, the court said:

> "The ruling ordering deportation in United States ex rel. Eichenlaub v. Shaughnessy, supra, was based upon the statute of May 10, 1920, 8 U.S.C.A. § 157, which was a special statute dealing with sabotage and espionage during the first World War and applicable to some 650 aliens then in custody. We do not believe that the construction given to the different wording of that statute is applicable to the general deportation statute which we are now considering." 239 F. 2d at 666-67.

which citizenship was lost,[11] the type of offense committed,[12] and the lapse of time between conviction and denaturalization.[13] These serious differentiations should not be disregarded by giving a ruthlessly undiscriminating construction to the statute before us not required by what Congress has written." 338 U.S. at 536-37.

---

[11] The "fraud" in procurement of naturalization which justifies revocation of citizenship may be of varying degrees of blatancy. Although petitioner's denaturalization was affirmed by this Court, the dissenting opinion said:

> "Petitioner answered truthfully when he listed 'real estate' as his 'occupation.' He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government." 365 U.S. at 289.

We do not suggest that the Court was wrong in affirming petitioner's denaturalization. We suggest only that there was room for Congress to distinguish between him and other improperly naturalized persons for deportation purposes.

[12] Without detracting from the gravity of the offense of attempting to evade income taxes, we suggest that Congress, if faced with the problem, could well distinguish, for deportation purposes, between convictions for that offense and for others. See *United States* v. *Carrollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939):

> "We are not prepared to rule that an attempt to evade the payment of a tax due the nation, or the commonwealth, or the city, or the school district, wrong as it is, unlawful as it is, immoral as it is, is an act evidencing baseness, vileness, or depravity of moral character. The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion. Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse words."

[13] Another basis of distinction which Congress might adopt is the lapse of time between naturalization and conviction, in the instant case almost thirty years.

Such distinctions, said Mr. Justice Frankfurter, "are not within the power of this Court to draw." 338 U.S. at 536.

The court below, by holding that in the word "is" Congress had used "the most comprehensive word that could have been used," has attributed to Congress an intent that there shall be no distinctions. We come, therefore, to the question whether Congress has used the word "is" to include "has been."

B. Congress Expressed No Intent in § 241 (a)(4) to Authorize Deportation of Denaturalized Persons for Convictions Occurring During Citizenship

The "ordinary meaning" of the language of the *Eichenlaub* statute—"aliens who . . . *have been* . . . convicted"—was held by a four-to-three vote of the Court to include a person who was a naturalized citizen when convicted but an alien when sought to be deported. 338 U.S. at 527, 530. It would seem to be self-evident that the ordinary meaning of § 241 (a)(4)—"alien . . . who . . . *is* convicted"—would not include such a person. The statute seems plainly to require the person to be deported to have been an alien at the time of the convictions in question. The government and the court below, however, read § 241(a)(4) as if it said "alien . . . who . . . *has been* convicted."

In support of its construction of the statute's present-tense language as if it were past-tense language, the government has relied upon the following authorities (R. 70-81 *passim*):

Eichenlaub, supra;
Resurreccion-Talavera v. *Barber,* 231 F. 2d 524 (9th Cir. 1956);

Application of Marks, 198 F. Supp. 40 (S.D.N.Y. 1961);[14]
Matter of M —, A-11875663, Int. Dec. 1169 (Board of Immigration Appeals, July 16, 1961);
Matter of W —, 5 I.&N. Dec. 759 (Board of Immigration Appeals, 1954);
Matter of S —, 5 I.&N. Dec. 678 (Board of Immigration Appeals, 1954);
Matter of P —, 4 I.&N. Dec. 373 (Board of Immigration Appeals, 1951).

In relying upon those decisions, the government has ignored the fact that they all involved statutes framed *in the past tense*. The statute in *Eichenlaub*, as already noted, covered "aliens who . . . *have been* . . . convicted . . . ." The *Resurreccion-Talavera* statute applied to "any alien who *was* convicted prior to entry . . . ." 231 F. 2d at 525. The other four decisions involved the exclusion statute, § 212 (a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(9), or earlier counterparts thereof, covering "aliens who *have been* convicted . . . ."

The significant distinction between present-tense and past-tense language is exemplified by *Mangaoang* v. *Boyd*, 205 F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876. The statute in that case[15] authorized deportation of "aliens who are members of . . . the Communist Party . . . ." The court held it inapplicable to an alien who had been a member of the Communist Party while he was a "national" of the United States but had abandoned that membership before losing his

[14] But see, *contra*, *Marks* v. *Esperdy*, 203 F. Supp. 389, 397 (S.D.N.Y. 1962), *reversed on other grounds*, 315 F. 2d 673 (2d Cir. 1963).

[15] Internal Security Act of 1950, § 22, 64 Stat. 1006.

nationality. There, as here, the government relied on *Eichenlaub*, but the court, distinguishing *Eichenlaub* on the statutory language, said:

> "We think that the language here under consideration, namely, 'Aliens who *are* members of . . . the Communist Party', (emphasis ours) was intended to refer to persons who are at the same time both aliens and members of the Communist Party. We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." 205 F. 2d at 555.

The court which decided *Mangaoang* later reemphasized the distinction between present-tense and past-tense statutes in *Resurreccion-Talavera* v. *Barber*, 231 F. 2d 524 (9th Cir. 1956). The statute in that case was framed in the past tense: "any alien who was convicted, . . . prior to entry, of a felony . . . involving moral turpitude . . . ." 231 F. 2d at 525. Talavera, like Mangaoang, was a former national of the United States who had lost his nationality upon the proclamation of Philippine independence in 1946. While an American national, in 1942, he had been convicted of burglary. In sustaining Talavera's deportation, over his claim that the *Mangaoang* decision precluded it, the Court said:

> "The fact that Talavera was a national of the United States and not an alien at the time of his conviction of the crime involving moral turpitude is irrelevant. The case of Mangaoang v. Boyd, supra, relied upon by appellant, is clearly distinguishable. Mangaoang was ordered deported under the provisions of the Internal Security Act of 1950, which authorized deportation of '. . . (C)

> Aliens who *are* members of . . . the Communist Party of the United States.' § 22, U.S. Code Cong. Service 1950, p. 1001.. (Emphasis added.)'"[16] 231 F. 2d at 525.

The basis of the decision is unmistakable. Talavera was deportable for a conviction occurring before he became an alien, because the applicable statute said "alien who *was* convicted" and was clearly intended to cover the pre-entry past, no matter how distant. In distinguishing the case from its earlier decision in *Mangaoang,* the court dispelled all doubt that, when the statute frames the ground of deportability in present-tense language—e.g., in *Mangaoang,* "aliens who are members," and, in the instant case, "alien . . . who . . . is convicted"—there must be a coincidence between the ground of deportability and the status of alienage.

This distinction between past-tense and present-tense language which the Ninth Circuit drew in *Talavera* was drawn by the Board of Immigration Appeals itself in *Matter of S —,* 5 I.&N. Dec. 678 (1954), in holding excludable an alien who, while he was a citizen, had committed a crime involving moral turpitude. Like Talavera, the alien had relied on *Mangaoang.* Since the exclusion statute, § 212 (a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(9), covers "aliens who *have been* convicted," the Board, relying on the "ordinary meaning" of the language, held, just as did the court in *Talavera,* that the

[16] Despite the fact that the court thus emphasized the present tense of the verb in the *Mangaoang* statute in distinguishing the case before it from *Mangaoang,* the government here maintains that "there is nothing in *Talavera* . . . to indicate that the tense affected the . . . decision" (R. 74).

conviction need not have coincided with the status of alienage, but could have occured at any prior time. In distinguishing the case before it from *Mangaoang* the Board referred specifically to that portion of the *Mangaoang* opinion which emphasized the statute's use of the present tense, "aliens who *are* members . . . ." 5 I.&N. Dec. at 680, n. 2.

It would seem, therefore, that if § 241 (a)(4) is read in accordance with the "ordinary meaning" of its words, as the Board read the exclusion statute and as this Court read the *Eichenlaub* statute, it clearly requires convictions during alienage as a ground of deportation. At the very least, we submit, the statute cannot be read as a clear expression of intent to deport petitioner for convictions which occurred while he was a citizen. If the most that can be said for the government's position is that there is an ambiguity in § 241 (a)(4)—and we submit that is the most that can be said for it—there comes into play the well-established principle that, where two constructions of a deportation statute are possible, the one favorable to the alien must be adopted. This Court said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388 . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

The beneficent effect of the *Fong Haw Tan* principle[17] was eliminated by the court below by the simple expedient of declaring, in utter disregard of the foregoing pertinent authorities and of the internal evidence of the statute itself, that "there is no room for interpretation or construction" (R. 129). "In the context of the statute," said the court, "the word 'is' appears to us to be the most comprehensive word that could have been used, just as is the case with the phrase 'at any time after entry'" (R. 129).

In thus reading "is" to include "has been," the court below ignored the fact that in other subparagraphs of the very same subsection of the 1952 Act, Congress, when it meant post-entry conduct, no matter when occurring, to be a ground of deportability, did not use the so-called "comprehensive" word "is", but rather spelled out its meaning in specific past-tense language. Section 241 (a), 8 U.S.C. § 1251(a), authorizes the deportation of any alien who:

> "(7) is engaged, or at any time after entry *has engaged*" in certain conduct;

---

[17] See also *Bonetti* v. *Rogers*, 356 U.S. 691, 699; *Barber* v. *Gonzales*, 347 U.S. 637, 642-43; *Gubbels* v. *Hoy*, 261 F. 2d 952, 956 (9th Cir. 1958); *Holzapfel* v. *Wyrsch*, 259 F. 2d 890, 893 (3d Cir. 1958); *Ablett* v. *Brownell*, 240 F. 2d 625, 628 (D.C. Cir. 1957); *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666 (6th Cir. 1956); *United States ex rel. Alcantra* v. *Boyd*, 222 F. 2d 445, 447 (9th Cir. 1955); *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759, 765 (8th Cir. 1954); *United States ex rel. Giglio* v. *Neelly*, 208 F. 2d 337, 341 (7th Cir. 1953); *Mangaoang* v. *Boyd*, 205 F. 2d 553, 556 (9th Cir. 1953), *cert. denied*, 346 U.S. 876; *Mirabal-Balon* v. *Esperdy*, 188 F. Supp. 317, 319 (S.D.N.Y. 1960); *Tutrone* v. *Shaughnessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958); *Jeronimo* v. *Murff*, 157 F. Supp. 808, 815 (S.D.N.Y. 1957).

"(11) is, or hereafter at any time after entry *has been,* a narcotic drug addict, or who at any time *has been* convicted of a" narcotics violation;

"(12) is or at any time after entry *has been* connected with the management, of a house of prostitution or any other immoral place";

"(15) at any time within five years after entry, shall *have been* convicted of violating the provisions of title I of the Alien Registration Act. 1940";

"(16) at any time after entry, shall *have been* convicted more than once of violating the provisions of title I of the Alien Registration Act. 1940."

Simple logic and normal principles of construction suggest that Congress meant what it said in each provision and that subparagraph (4), lacking the past-tense language which was included in the other cited subparagraphs, was intended to apply only to one convicted during alienage.

The court below, taking a phrase out of context from *Lehmann* v. *United States ex rel. Carson,* 353 U.S. 685, 689, suggests (R. 129) that this Court has read "is" to mean "has been" in § 241 (a)(4). In *Carson* the alien sought to be deported had *at all times* been an alien. There was no issue relating to concurrence *vel non* of alienage and convictions. The issue before the Court was whether a twice-convicted alien who was non-deportable under the pre-1952 deportation statute became deportable when § 241 (a)(4) was enacted in 1952. The Court held that the alien did become deportable in 1952. Nothing in the opinion suggested that he would be deportable if he had not been an alien at the time of his convictions. All that the Court said

in the language relied on below is that one who, before 1952, has fulfilled the conditions of deportability prescribed by the 1952 Act may be deported. Those conditions, we have shown (and nothing in *Carson* is to the contrary), are the concurrence of alienage and convictions. In using the past-tense form "has been convicted", the Court only meant, as is clear from the context, that the 1952 deportation provision could apply even though the conditions of deportability occurred before 1952.

Nor does the phrase "at any time after entry", so heavily relied on by the court below, magically give a present-tense verb past-tense effect. The court seemed to think that the quoted phrase makes it clear and unequivocal that an alien is deportable for post-entry convictions, whether or not he was an alien at the time of the convictions (R. 129-30). In attributing to the phrase force enough to make "is" mean "has been", the court has again ignored the various other subparagraphs of § 241(a), in which, although using the phrase "at any time after entry", Congress found it necessary to use both a present-tense and a past-tense verb. See pp. 17-18 *supra*. For example, if "alien . . . who at any time after entry is convicted" [§ 241 (a)(4)] applies to one who was not an alien when convicted, why was it necessary for Congress, in basing deportability on drug addiction, to say "alien . . . who . . . is, or hereafter *at any time after entry has been*, a narcotic drug addict . . . ." [§ 241 (a)(11)]?

We submit that the phrase "at any time after entry" has a much more obvious purpose and effect than that attributed to it below. Section 212 (a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1182 (a)(9), provides for the exclusion of aliens who

have been convicted of a crime involving moral turpitude. Any alien thus excludable who nevertheless enters the United States is made deportable by § 241 (a)(1), 8 U.S.C. § 1251 (a)(1). The purpose of § 241 (a)(4) is to authorize deportation of aliens who were not excludable but who are convicted after entry. If the "after entry" phrase were omitted from § 241 (a)(4), that subparagraph would largely duplicate § 241 (a)(1). The phrase has no other significance than to make deportable those aliens whose convictions occur after their entry into the United States. There is nothing in the phrase to make the statute applicable to persons convicted as citizens but later becoming aliens.

By any fair reading of § 241 (a)(4), therefore, Congress cannot be held to have intended to cover pre-alienage convictions. At the very least the subsection is ambiguous in that respect and, under the *Fong Haw Tan* principle, must be construed in favor of petitioner. The legislative scheme of § 241 as a whole, as we shall next show, provides further basis for construing the subsection as not covering pre-alienage convictions or for resolving ambiguity in favor of the alien if the subsection be found ambiguous.

C. Subsection (b) of § 241, Read Together With Subsection (a)(4), Shows That Congress Did Not Intend to Authorize Deportation of Denaturalized Persons for Convictions Occurring During Citizenship

While subsection (a)(4) provides for deportation of aliens convicted of crimes, subsection (b), 8 U.S.C. § 1251 (b), provides that "subsection (a)(4) . . . respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such alien for such crime shall make, at the

time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported . . . ." In *Gubbels* v. *Hoy*, 261 F. 2d 952, 954 (9th Cir., 1958), in setting aside an order deporting an alien under § 241 (a)(4) on account of two convictions by courts martial, the court said:

> "It seems plain that the qualifying provisions of subsection (b) are an important part of the legislative scheme expressed in subsection (a)(4). While that section makes a conviction there referred to ground for deportation, it is qualified in an important manner by the provision of subsection (b)(2) that if the court sentencing the alien makes the recommendation mentioned, then the provisions of subsection (a)(4) do not apply. This extends to the alien an important right or privilege. No doubt in most cases counsel for a convicted alien would by motion call this provision to the attention of the court where the judgment was imposed. It also seems plain that if a military court is so constituted or its procedures are such as to make this privilege extended by subsection (b)(2) not readily available to a convicted alien, then it would be a fair conclusion that convictions in a military court were not contemplated by subsection (a)(4)."

Gubbels has thus held that § 241 (a)(4) must be read in the light of § 241 (b) and must, therefore, be construed not to apply to any alien who cannot have had the privilege given by subsection (b) of seeking a recommendation of non-deportation. The court below rejected petitioner's contention that, under *Gubbels*, § 241 (a)(4) must be construed as inapplicable to him because, as a citizen at the time of his convictions, he could not have availed himself of the procedure which

subsection (b) extends only to aliens (R. 131-32). This rejection was based on the grounds that: (1) petitioner waived his subsection (b) rights "as he had secured his naturalization by fraud"; (2) petitioner was chargeable with knowledge of his vulnerable citizenship and, therefore, could have sought the subsection (b) recommendation when he was convicted, even though not yet denaturalized; and (3) the right given in subsection (b) is not an "inherent right", and can, therefore, be withheld by Congress. All three of these grounds, we submit, are untenable.

The "waiver" ground (R. 131) ignores the real point in *Gubbels*. Subsection (b) is not merely the grant of a privilege. It is also a qualification of the deportation authority conferred by subsection (a)(4). What *Gubbels* says is that, where the subsection (b) privilege is "not readily available," the case is not within subsection (a)(4)'s grant of authority to deport. In short, Congress did not intend to authorize deportation of a denaturalized alien for convictions occurring while he was a naturalized citizen who, as such, could not have invoked the recommendation procedure which is an intrinsic part of the legislative scheme.

The statement below that petitioner could have invoked the subsection (b) procedure (R. 131-32) ignores the fact that petitioner was not an alien at the time of his sentencing. Subsection (b), as noted, provides that the court sentencing "such alien" may recommend that "such alien" not be deported. Granting petitioner's fraudulent procurement of citizenship, he had no legal right to treat his naturalization as a nullity in order to invoke a procedure provided by law only

to aliens. See *United States* v. *Stephan*, 50 F. Supp. 445, 448 (E.D. Mich. 1943):

> "It is self-evident that fraud in procuring the order of naturalization, although a ground for its cancellation, does not render it void but only voidable; and that until such time as his citizenship is revoked, such fraud does not lessen his obligations and duties to this country or relieve him of the solemn undertakings he made in his oath of allegiance."

In first ordering petitioner's deportation, the Immigration and Naturalization Service, commenting on the *Stephan* case, said (R. 57):

> "All this case holds is that unless and until the individual is denaturalized by a court, he is still recognized as a citizen for all purposes. The Government had its choice of prosecuting for treason or bringing an action to denaturalize. It chose the former. Stephan was not in a position to declare himself denaturalized for fraud,—only a competent court could do so."

The statement that petitioner could have invoked the subsection (b) procedure, therefore, has no basis in law. Moreover, even if he *could* have declared himself to be an alien, five years before his denaturalization, the suggestion that he *should* have done so amounts to saying that one whose citizenship is subject to challenge may be penalized for defending it. Until this Court affirmed his denaturalization, petitioner had every right to maintain that his citizenship had not been obtained improperly, a position taken also by the dissenting members of this Court. *Costello* v. *United States*, 365 U.S. at 288-89.

There is a very simple answer to the third ground relied on below for rejecting petitioner's contention under *Gubbels*. It is undeniable that an alien has no "inherent right" to remain in the United States and that, correlatively, Congress has power to legislate toward his removal. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724. But only by such legislation is his right impaired and, indeed, by virtue of the principle of *Fong Haw Tan*, only if that legislation clearly and unambiguously applies to him. As Judge Learned Hand said in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490 (2d Cir. 1950):

> "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate."

By imposing subsection (b) as a limitation on subsection (a)(4)'s grant of authority to deport, "Congress recognized that not every conviction of a crime involving moral turpitude within the legal definition of that term required deportation but that there might well be mitigating circumstances under which the harsh penalty of deportation should not be imposed." *Tutrone* v. *Shaughnessy*, 160 F. Supp. 433, 437 (S.D. N.Y. 1958).[18] Petitioner's contention that Congress

---

[18] Cf. the language of Mr. Justice Frankfurter in the *Eichenlaub* dissent, quoted *supra* pp. 10-11. As pointed out below, Congress was aware of what was said in *Eichenlaub* when it enacted the 1952 Act (R. 131). It may well be that the imposition of § 241 (b) as a limitation on subsection (a)(4)'s grant of authority to deport was Congress' answer to the problem posed by the *Eichlenlaub* dissent.

expressed no intent in § 241 (a)(4) and (b) to authorize his deportation is, therefore, not disposed of by the declaration below that Congress has the power to do so.

It is submitted that there is no basis, either in law or reason, for sustaining the determination that § 241 (a)(4) authorizes deportation of petitioner as a present alien convicted of two crimes while he was a naturalized citizen. If we are correct in this submission, the validity of the deportation order must depend on the government's secondary contention—that, for the purpose of § 241 (a)(4)'s application, petitioner was an alien when convicted.

II. PETITIONER'S DENATURALIZATION DID NOT RELATE BACK TO THE DATE OF HIS NATURALIZATION TO MAKE HIM DEPORTABLE UNDER § 241(a)(4) AS ONE WHO WAS AN ALIEN AT THE TIME OF HIS CONVICTIONS.

Respondent has ruled, as an alternative basis for supporting the deportation order, that petitioner was an alien at the time of his convictions, by virtue of the relation back of his denaturalization to the date of his naturalization (R. 54-58, 87-89). The court below did not rely upon this alternative ground of deportation, but respondent continues to press it in this Court. See Brief in Opposition, pp. 4 and 6, n.

The basis of this asserted alternative is an importation into the deportation statute of the provision of § 340 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451 (a), under which petitioner was denaturalized in 1959, that the order of denaturalization "shall be effective as of the original date of" the naturalization order. To prevail on this point the government must show that Congress intended, by in-

cluding this language in the denaturalization provision, to lay a ground for deporting under § 241 (a)(4) an individual whose convictions occurred prior to denaturalization.

The statutes prior to 1952, although providing for denaturalization, contained no language making denaturalization effective as of the date of naturalization. Such "relation-back" language appeared for the first time in § 340 (a) of the 1952 Act. Yet, despite the absence of such language in the earlier statutes, it was generally held that a denaturalization for fraud made a nullity of the naturalization, *Johannessen* v. *United States*, 225 U.S. 227; *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 665, 666 (6th Cir. 1956); *Battaglino* v. *Marshall*, 172 F. 2d 979, 981 (2d Cir. 1949); *Rosenberg* v. *United States*, 60 F. 2d 475 (3d Cir. 1932), *cert. denied*, 287 U.S. 645; and that, for the purpose of determining rights of derivative citizenship, denaturalization related back to the date of naturalization. *Brancato, Battaglino and Rosenberg, supra.*

There was no suggestion, however, in any of the authorities that such relation back applied for the purpose of *deportation*. In *Rosenberg*, the court was careful to point out:

> "The question of the right of the government to deport is not here involved." 60 F. 2d at 476.

In *Brancato* where the government made the very same argument here advanced, so that the right of the government to deport was involved, the court refused to hold that the individual's denaturalization in 1939 related back to 1929, when he was naturalized, so as to make him an alien at the time of his 1930 "entry"

and thus deportable under the first clause of § 241 (a) (4). The court said:

> "The Government's contention would require that we give the statute a relation-back construction. We have no difficulty in giving a retroactive effect to the *denaturalization order* in view of the authorities supporting such a ruling. But the Government has cited us no case from the Supreme Court or the U.S. Courts of Appeals which has gone the additional step and given such relation-back construction to the *deportation statute*. It was urged upon the Supreme Court in United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529, 70 S. Ct. 329, 94 L. Ed. 307, where the Court found that a ruling on the question was unnecessary for a disposition of the case. We think that the Court's later ruling in Barber v. Gonzales, supra, 347 U.S. 637, 642, 74 S. Ct. 822, 98 L. Ed. 1009, indicates disapproval of a relation-back construction." 239 F. 2d at 666. (Emphasis supplied.)

Brancato involved the first clause of § 241 (a)(4) ("... alien ... who is convicted of a crime ... committed within five years after entry ...."), while the case at bar involved the second clause ("... alien ... who at any time after entry is convicted of two crimes ...."). But this dissimilarity does not, as the government contends,[19] impair *Brancato's* force here. What *Brancato* said of the inapplicability of the relation-back doctrine for deportation purposes was not directed to any particular ground of deportation but to "the deportation statute" generally.

An argument similar to the one it urges here was urged by the goverenment in *Mangaoang* v. *Boyd*, 205

[19] Brief in Opposition, p. 4, n. 1.

F. 2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876. The Philippine Independence Act of 1934, § 8(a)(1), 48 Stat. 462, provided that "for the purposes of . . . laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States *shall be considered as if they were aliens* . . . ." (Emphasis supplied.) The government argued, therefore, that, for the purpose of the deportation provision of the Internal Security Act, Mangaoang should be considered as if he were an alien during the time that he was a member of the Communist Party. The court, in disposing of the government's contention, noted that the 1934 Act did not make Mangaoang an alien in 1938, but provided only that he was so to be considered for limited purposes. If he were to be deported, the court noted, it would have to be by virtue of the Internal Security Act of 1950. The court said:

> "The question is whether the word 'aliens' in subdivision (C)—'Aliens who are members of . . . the Communist Party', includes not only aliens in the ordinary sense but was intended to be broad enough to include persons who were in reality nationals of the United States but who under the provisions of the Act of March 24, 1934 were to be 'considered as if they were aliens'.
>
> "If it be conceded that the word 'aliens' in the present Act [Internal Security Act of 1950] might possibly be given so broad a construction, *the most that could be said is that this possibility suggests an ambiguity.* There is nothing to show that when Congress enacted the Internal Security Act, it had in mind the very special case of the Filipinos described in the quoted section of the Act of March 24, 1934. Clearly we deal here with an Act which, if it were

to apply to this appellant, would have a punitive impact. * * *

"We think that the rule of strict construction should be applied to a statute having this impact, and that subdivision (C) above quoted must be construed to use the word 'aliens' in the ordinary sense and connotation, and not to include Filipinos who were for certain limited purposes to be 'considered as . . . aliens', under a section of a law long since obsolete and inoperative. We think therefore that the Act here in question did not authorize the appellant's deportation." 205 F. 2d at 556. (Emphasis supplied.)

The court held, in short, that, though persons like Mangaoang were to be "considered as if they were aliens" for various purposes, they could not be so considered for deportation purposes.

If the relation-back doctrine were here imported into the deportation statute, "the most that could be said," just as in *Mangaoang*, "is that this possibility suggests an ambiguity." The resulting ambiguity would have to be resolved here, just as it was in *Mangaoang*, in favor of the alien and against deportability. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. And, again as in *Mangaoang*, "there is nothing to show that when Congress enacted [§ 241 (a)(4)], it had in mind the very special case of" an individual convicted long after naturalization and before denaturalization.[20]

[20] The references to § 241 (a)(4) in the congressional committee reports never consider such a case or situation. See H. Rep. No. 1365, 82d Cong., 2d Sess. 60 (1952); S. Rep. No. 1515, 81st Cong., 2d Sess. 390-92 (1950); S. Rep. No. 1137, 82d Cong., 2d Sess. 21 (1952); H. Rep. No. 2096 (Conference Report), 82nd Cong., 2d Sess. 127 (1952). Nor do the section-by-section analyses of the bill prepared by the Immigration and Naturalization Service. See

Indeed, the scheme of the deportation statute suggests the contrary, for an importation into § 241 (a) (4) of the relation-back concept of the denaturalization statute would deny effect to § 241 (b), which *Gubbels, supra,* has held to be an essential part of the legislative scheme. See pp. 20-25 *supra.* All persons treated as aliens for deportation purposes by application of the relation-back theory would automatically have been deprived of their opportunity to seek a recommendation against deportation. The intent of Congress that not all crimes involving moral turpitude should result in deportation, *Tutrone* v. *Shaughnessy,* 160 F. Supp. 433, 437 (S.D.N.Y. 1958), would thus be thwarted.

In the case at bar, indeed, there is less support for deportability than there was in *Mangaoang.* In the latter case, the provision of the Philippine Independence Act of 1934 which the government sought to import into the deportation statute applied in terms to "expulsion of aliens." Here, however, there is nothing to show that Congress intended the relation-back concept of § 340 (a) to apply for deportation purposes.

The internal evidence of § 340 itself indicates that the relation-back concept of denaturalization was intended to affect no more than derivative citizenship. See subsections (e) and (f) of § 340. Subsection (h),

---

Analysis of S. 3455, 81st Cong., 2d Sess. (1950), at pp. 241-3 through 241-6 (contained in vol. 5 of the Supreme Court Library compilation of legislative history of the Immigration and Nationality Act of 1952); and *Analysis of S. 716, 82d Cong., 1st Sess. (1951),* at pp. 241-2 through 241-4 (contained in vol. 4 of the said compilation). And see, generally, Besterman, *Commentary on the Immigration and Nationality Act,* 8 U.S.C.A., Part I, pp. 1-91 *passim* and legislative materials cited at pp. 2-4.

providing for the surrender and physical concellation of revoked certificates of naturalization, indicates that, apart from the effect upon derivative citizenship, Congress was concerned not with *ab initio* invalidity of revoked citizenship, but only with assuring that no future use be made of the revoked certificate.

The legislative history as well, albeit only by negative implication, suggests that it was only derivative citizenship which Congress intended to affect by the relation-back language. As we have shown, prior to the inclusion of the relation-back language in the statute, denaturalization was held to relate back in connection with claims of derivative citizenship. That Congress understood citizenship claims to be the area of application of the relation-back concept appears from S. Rep. No. 1515, 81st Cong., 2d Sess. 765 (1950). The subsequent committee reports, written in connection with the revised bills which contained the relation-back language and which ultimately became the 1952 Act, though treating the subject of "Judicial Revocation of Naturalization," say absolutely nothing about the effect of such revocation. See H. Rep. No. 1365, 82d Cong., 2d Sess. 82-83 (1952); and S. Rep. No. 1137, 82d Cong., 2d Sess. 45 (1952). It is unthinkable that, without saying a single word about it in a most copious legislative history, Congress could have intended the inclusion of the relation-back language to accomplish anything more than an adoption of the prevailing rule[21] that denaturalization relates back to defeat derivative citizenship. Absent an expression of

[21] The relation-back of denaturalization to defeat derivative citizenship, while the prevalent rule (see p. 26 *supra*), was not universally accepted. See *In re Bolter*, 66 F. Supp. 566 (S.D. Cal. 1946); *In re Findan*, 4 F. Supp. 189 (D.R.I. 1933).

intent, there would be as little reason to assume that Congress wished to affect the deportation grounds of § 241 (a)(4) as that it intended to create *ab initio* alienage for all other purposes. Considering the myriad situations in which a legal status, title or relationship is determined by citizenship and the wide variety of actual or potential state legislation on the subject (see 2 Am. Jur., *Aliens*, §§ 1-64 *passim*), it cannot seriously be thought that Congress intended, without saying so, to open a Pandora's box by creating retroactive alienage.

The function of § 241 (a)(4), as this Court said of the equivalent deportation provision of § 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended, "is to apprise aliens of the consequences which follow after conviction . . . of the requisite two crimes." *Jordan* v. *DeGeorge*, 341 U.S. 223, 230. And, though not a criminal statute, a deportation statute should be tested in the light of the "void for vagueness" doctrine. *Id.* at 230-231. As was said in *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 656-657 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449, in striking down on due process grounds a deportation order based on a conclusion that homosexual conduct is included within "psychopathic personality" as used in § 212 (a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (a)(4):

> "In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. [Citations omitted.] Or, as [otherwise] stated . . ., would persons of 'ordinary intelligence' be able to know what the statute means."

Surely petitioner cannot be said to have been on notice, when he filed the tax returns upon which he was convicted, that his 1925 naturalization was a nullity. Indeed, two of the eight Justices of this Court who ruled on his denaturalization were of the opinion that he held valid citizenship. *Costello* v. *United States*, 365 U.S. 265, 288. Section 241 (a)(4) certainly does not apprise an individual who, for a quarter of a century, has been enjoying the rights and privileges of citizenship that, if he should be convicted of two crimes of a certain type, he would be subject to deportation. To inject that consequence into the deportation statute by reading into it the relation-back concept of the denaturalization statute needlessly imperils the former statute by introducing an element of vagueness which Congress did not place in it.

The relation-back rule which respondent here urges goes beyond the position respondent itself has taken administratively in other cases. The Board of Immigration Appeals, while utilizing the relation-back concept from time to time, appears never to have sought to apply it to make a deportation sanction retroactive under a statute written *in praesenti*.[22] Thus the Board applied it in *Matter of P* —, 4 I.&N. Dec. 373 (1951), in sustaining a deportation under the counterpart of the present § 212 (a)(9), which covers "aliens who *have been convicted*" prior to entry. A similar application

[22] So long as the Board was dealing with statutes framed in the past tense, the invocation of the relation-back doctrine was of relatively little materiality, for the statutes themselves were held to apply to present aliens who had pre-alienage convictions, quite apart from any relation-back doctrine. See *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521; *Resurreccion-Talavera* v. *Barber*, 231 F. 2d 524 (9th Cir. 1956).

of the concept was made in *Matter of W —*, 5 I.&N. Dec. 759 (1954).

To use the relation-back concept to make § 241 (a) (4) retroactive would seem inconsistent with the Board's own basic distaste for the concept. In *Matter of C —*, 3 I.&N. Dec. 275 (1948, approved by Attorney General 1950), the Board said, in reversing the deportation of an alien based on an entry without a visa while he was a naturalized citizen:

> "When respondent left the United States in August 1930 to visit in Europe and when he returned in June 1931, he was, both from a legal and from a factual point of view, an American citizen. As such he was not in any way subject to the immigration laws. He was free to cross our borders without restraint and without regard to any of the documentary requirements of the Immigration Act of 1924. * * *
>
> "The theory of the Service . . . can be supported only through the use of the doctrine of relation back, a legal fiction at best. We do not think this legal fiction must be universally applied in every situation regardless of the particular circumstances involved. For example, we hardly think that a man in respondent's position who exercised his rights of citizenship prior to the cancellation of his certificate of naturalization could be punished for so acting even though, through the operation of the doctrine of relation back, he was an alien at the time he exercised those rights and even though his acts might be said to have been illegal. To us it seems unfair to seize upon a fiction to require respondent to have done that which was impossible of performance, namely, to present an immigration document at the time of his 1931 entry. 'Respect for law does not thrive

> on captious interpretations.' *Delgadillo* v. *Carmichael*, [332 U.S. 338]. To construe the 1924 act to require the impossible strikes us as a captious interpretation, an interpretation that we do not think Congress could have intended." [23]

To the demonstration that the Sixth and Ninth Circuits, in *Brancato* and *Mangaoang*, respectively, have rejected the application of the relation-back concept to a deportation statute, respondent reacts by executing an administrative gerrymander of the denaturalization statute. It confines *Brancato* and *Mangaoang* to their own facts and then approves the conclusion of its Special Inquiry Officer that

> ". . . denaturalization is retroactive and confers upon the subject the status of an alien at all times and for all purposes, except that one who entered while naturalized may not be considered as having entered as an alien, and except that certain language providing for the deportation of an alien who is a member of a proscribed organization requires that there must be a co-existence of alienage and membership." (R. 87-88).

Presumably if another circuit joins the Sixth and the Ninth in holding the relation-back concept inapplicable to deportation, respondent will simply add another "except" to its conclusion. Such *ad hoc* administrative accommodations can serve only to add confusion to a branch of the law not noted for its clarity.

---

[23] Subsequently, the Board limited *Matter of C———* to deportation orders based on documentary charges, under the misapprehension that such a limitation was required by this Court in *Eichenlaub*. See *Matter of P———*, 4 I. & N. Dec. at 375. But *Eichenlaub* compelled no such limitation, since it avoided any approval of the relation-back doctrine. See *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d at 666.

It would seem that nothing short of a dispositive holding of this Court will prevail upon the immigration authorities to accept the fact that Congress, in providing for *ab initio* invalidity of improperly procured naturalization, intended to affect no more than claims to derivative citizenship.

CONCLUSION

We submit that we have shown in Point I of our argument (1) that § 241 (a)(4) excludes petitioner from the class of deportables, since it applies only to persons who were aliens at the time they were convicted; and (2) that such ambiguity on this question as may be said to exist in § 241 (a)(4) must be resolved against deportability.

We submit, further, that we have shown in Point II of our argument (1) that the relation-back feature of the denaturalization statute may not be read into § 241 (a)(4) to make petitioner, for deportation purposes, an alien at the time he was convicted; and (2) that, even if the relation-back of denaturalization were imported into § 241 (a)(4), it could do no more than introduce an ambiguity which would, in any case, have to be resolved against deportability.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

EDWARD BENNETT WILLIAMS,
HAROLD UNGAR,
1000 Hill Building
Washington 6, D. C.
Counsel for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Summary of argument	3
Argument:	
I. Section 241(a)(4), in directing the deportation of aliens twice convicted of crimes involving moral turpitude, does not exempt convictions entered while the alien held a fraudulently-procured certificate of naturalization	8
A. Possession of a certificate of naturalization on the date of the convictions has no logical relevance to the purpose of Section 241(a)(4) to remove from the country those aliens whose continued presence is considered to be undesirable because of their demonstrated criminal propensities	10
B. Pre-denaturalization conduct would, under petitioner's interpretation, be basis for deportation under some of the deportation provisions but not others, a difference for which there is no justifying rationale	12
C. Petitioner's argument would create an irrational preference in favor of aliens who procure naturalization certificates by fraud	17
D. Petitioner's interpretation irrationally makes deportability turn upon the alien's prior status at the time of the convictions rather than at the time of the commission of the acts	17

709-982—63——1

Argument—Continued
I. Section 241(a)(4), etc.—Continued
E. The decision of this Court in *Eichenlaub* v. *Shaughnessy*, construing substantially identical language in a prior act, controls this case ..... Page 18
F. Section 241(b) provides no reason why petitioner's convictions should not be made a basis for his deportation 22
II. Section 340(a), which provides that an order cancelling a certificate of naturalization for fraud "shall be effective as of" the date the certificate was issued, precludes the invocation of petitioner's cancelled "citizenship" as a defense to his deportation based on his conviction, while holding the fraudulently-procured naturalization certificate, of two crimes involving moral turpitude 25
A. The history of the relation-back provision shows that it was intended to apply to deportation 27
1. Judicial background 27
2. Legislative development 30
3. Implications of the legislative development 34
B. The relation-back provision has no consequence for derivative-citizenship purposes, making less than adequate petitioner's explanation that that was its sole intended consequence 36
C. Whatever limits there may be on the implications of the relation-back provision, its application here is the minimum content that can be given to it 37
Conclusion 42
Appendix 45

CITATIONS

Cases:

	Page
Battaglino v. *Marshall*, 172 F. 2d 979, certiorari denied, 338 U.S. 829	39, 31, 35
Brancato v. *Lehmann*, 239 F. 2d 663	39
C———, Matter of, 3 I. & N. Dec. 275	38
Circella v. *Neelly*, 115 F. Supp. 613, affirmed 216 F. 2d 33, certiorari denied, 348 U.S. 817	24
Costello v. *United States*, 350 U.S. 359	2
Costello v. *United States*, 365 U.S. 265	2
Eichenlaub v. *Shaughnessy*, 338 U.S. 521	5, 6, 7, 18, 19, 20, 22, 29, 31, 32, 34, 35, 36, 42
Eichenlaub v. *Watkins*, 167 F. 2d 659, affirmed *sub nom. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521	29, 30
Findan, In re, 4 F. Supp. 189	29
Gubbels v. *Hoy*, 261 F. 2d 952	23, 24
Johannessen v. *United States*, 225 U.S. 227	28
Lehmann v. *Carson*, 353 U.S. 685	15
Luria v. *United States*, 231 U.S. 9	28
Mangaoang v. *Boyd*, 205 F. 2d 553, certiorari denied, 346 U.S. 876	16, 40
Rosenberg v. *United States*, 60 F. 2d 475, certiorari denied, 287 U.S. 645	28, 29, 31
United States v. *Costello*, 145 F. Supp. 892, reversed, 247 F. 2d 384, reversed, 356 U.S. 256	18
Willumeit v. *Shaughnessy*, 338 U.S. 521	18, 31, 32, 34, 35, 36
Willumeit v. *Watkins*, 171 F. 2d 773, affirmed *sub nom. Willumeit* v. *Shaughnessy*, 338 U.S. 521	29

Statutes:

Act of June 29, 1906, § 15, 34 Stat. 601	27
Act of May 10, 1920, § 1, 41 Stat. 593	14, 19
Act of Sept. 26, 1961, § 18, 75 Stat. 656	46
Alien Registration Act of 1940 (54 Stat. 672) § 20(b)	14
Immigration Act of 1917 (39 Stat. 874):	
§ 19	11, 22
§ 19(a)	14
Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U.S.C. 1251, 1451):	
§ 101(a)(13)	39, 42
§ 241	10

Statutes—Continued

Immigration and Nationality Act of 1952—Continued Page

§ 241(a) 2, 14, 41
§ 241(a)(4) ..... *in passim*
§ 241(a)(14) 14
§ 241(a)(15) 14
§ 241(a)(16) 14
§ 241(a)(17) 14
§ 241(b) 2, 6, 22, 23, 24, 41
§ 340(a) 2, 6, 25, 26, 30, 34, 35, 37, 38, 42, 46
§ 340(e) 37
§ 340(f) 2, 7, 32, 37, 46
Internal Security Act of 1950, § 22, 64 Stat. 1006 ..... 16, 40
Nationality Act of 1940, § 338(a), 54 Stat. 1158 27

Congressional Material:

53 Cong. Rec. 5167 11
82 Cong. Rec. 5089 14
96 Cong. Rec. 5412, 5451–5452 32
H.R. 10384, 64th Cong., 2d Sess 11
H.R. 5678, 82d Cong., 2d Sess 34
Joint Hearings before the Subcommittee of the Committee of the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess 14, 34
S. 2055, 82d Cong., 1st Sess 34
S. 3455, 81st Cong., 2d Sess 14, 32, 37
S. Rep. No. 352, 64th Cong., 1st Sess 11
S. Rep. No. 1515, 81st Cong., 2d Sess 13, 15, 30, 32
S. Res. 137, 80th Cong., 1st Sess 30

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, PETITIONER.

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 126–135) is reported at 311 F. 2d 343.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1962 (R. 136). The petition for a writ of certiorari was filed on February 28, 1963, and was granted on April 22, 1963, limited to question 1 of the petition (R. 137; 372 U.S. 975). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 241(a)(4) of the Immigration and Nationality Act of 1952, directing that "Any alien in the

United States * * * shall * * * be deported who at any time after entry is convicted of two crimes involving moral turpitude," applies to an alien who was convicted of the crimes during a period when a fraudulently procured certificate of naturalization which was later cancelled remained outstanding.

STATUTE INVOLVED

Sections 241(a) and (b) and 340 (a) and (f) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1251 (a) and (b), 1451 (a) and (f), are set out in pertinent part in the Appendix (pp. 43–45, *infra*).

STATEMENT

Petitioner, born in Italy, entered the United States as an alien in 1895 and was naturalized in 1925 (R. 43). In 1954, he was convicted of having wilfully attempted to defeat and evade the payment of income taxes by filing false and fraudulent income tax returns for the years 1948 and 1949 (R. 48). The convictions were affirmed by this Court. *Costello* v. *United States*, 350 U.S. 359. In 1959, the order admitting petitioner to citizenship was revoked and set aside and his certificate of naturalization was cancelled on the ground that they had been procured by wilful misrepresentation (R. 13). The judgment ordering petitioner's denaturalization was likewise affirmed by this Court. *Costello* v. *United States*, 365 U.S. 265.

In 1961 the Immigration and Naturalization Service commenced proceedings to have petitioner ordered deported under § 241(a)(4) of the Immigration and Nationality Act, as an alien who "at any time after

entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," *i.e.*, income tax evasion for the years 1948 and 1949. The Special Inquiry Officer found petitioner deportable (R. 43–62); the Board of Immigration Appeals sustained the order (R. 65–90); and the court of appeals, upholding the order on the merits, dismissed the petition for review (R. 126–135). This Court granted certiorari limited to the single question whether a denaturalized alien may be deported under § 241(a)(4) on the basis of convictions that antedated his denaturalization (R. 137; 372 U.S. 975).

SUMMARY OF ARGUMENT

I

The question is whether an alien whose fraudulently procured naturalization was revoked after he had already been convicted of two crimes involving moral turpitude is deportable under § 241(a)(4) of the Immigration and Nationality Act, which provides that:

> Any alien in the United States * * * shall * * * be deported * * * who at any time after entry is convicted of two crimes involving moral turpitude, * * *

We contend as our first argument that the reference to "Any alien" requires only that the person sought to be deported be an "alien" and hence subject to deportation. Petitioner contends that the use of the present tense "is" in "Any alien * * * who * * * *is* convicted" requires that the deportee also have been

an alien at the time of the convictions. While petitioner's interpretation is, we believe, an unnatural reading of the words, the more conclusive answer is that it produces untenable results that Congress could not have intended.

A. The purpose of § 241(a)(4) was to require expulsion from the country of those aliens whose continued presence was, because of their demonstrated criminal propensities, considered to be undesirable. Whatever the alien's prior status, his conviction of two crimes demonstrates his criminal propensities, and hence undesirability, to the same degree. That an alien held a fraudulently procured certificate of naturalization at the time of conviction has, therefore, no logical relevance to the purpose to be served by § 241(a)(4).

B. The dependence of petitioner's interpretation upon the use of the present tense "is" in § 241(a)(4) means that most of the other provisions providing for deportation on the basis of past events, being phrased in the past tense, would remain applicable to pre-denaturalization conduct. No reason is apparent—and petitioner offers none—why Congress would have singled out § 241(a)(4) in that respect, and the indications are, to the contrary, that the variations in tenses reflect only differences in style and in the historical origins of the provisions. This Court, moreover, has held that "is" as used in § 241(a)(4) means "has been" for purposes of authorizing deportation based on convictions which antedated the Act. If the distinction was not considered significant

for that purpose—the purpose for which the tense used would seem primarily relevant—it cannot be for this purpose.

C. Under petitioner's reading, aliens who had been convicted of two crimes but had committed no fraud would be deportable while those who had committed two crimes plus a fraud (to obtain naturalization) would not be. Congress could not have intended to prefer persons guilty of fraud over those innocent of fraud.

D. If an alien's prior naturalized status was intended to be made a shield against deportation for things done while holding that status, deportability would logically have been made to turn upon status at the time of the commission of the acts, not at the time of conviction. Since § 241(a)(4), however read, speaks only of convictions, either petitioner's interpretation is unsound or Congress established an irrational standard.

E. In *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, this Court interpreted similar language ("aliens who * * * may hereafter be convicted") as not requiring alienage at the time of conviction. Not only was the statute not meaningfully distinguishable from § 241(a)(4), but the rationale of the Court's opinion—relying primarily upon the lack of any rational explanation, reasonably attributable to Congress, for the incongruous results produced by a contrary interpretation—is fully applicable to this case.

F. Petitioner's asserted inability, because of his outstanding naturalization at the time of the convic-

709-082—63——2

tions, to have applied to the sentencing court under § 241(b) of the Act for a recommendation against deportation was, if it existed at all (which we deny), the result of his own fraud and provides no reason for disregarding the convictions.

II

Whatever doubts there may be about the independent applicability of § 241(a)(4) are removed by the interaction with that provision of the express direction in § 340(a) of the Act that a revocation of naturalization for fraud "shall be effective as of the original date of the * * * certificate" of naturalization. Given its natural meaning, that provision would make petitioner deportable under § 241(a)(4) regardless of whether "alienage" is required at the date of conviction. The history of the provision confirms that reading, for it shows that the prevention of a denaturalized alien's use of his cancelled certificate as a defense to deportation for prior convictions was, indeed, the most immediate and central purpose of the provision.

A. The enactment of the relation-back provision, new to the 1952 Act, seems plainly to have been prompted by this Court's decision in 1950 in the *Eichenlaub* case, *supra*. Prior to that decision, the lower courts had uniformly held that denaturalization for fraud was effective retroactively to the date of naturalization. In *Eichenlaub*, however, this Court, deciding the case on a different ground (see Point I, *supra*), treated the validity of the judicial relation-

back doctrine as being an open question. At the following session of Congress, there was added to the evolving bills leading to the 1952 Act, for the first time, the provision expressly directing that denaturalization "shall be effective as of" the date of naturalization. Since *Eichenlaub* involved a claimed application of the relation-back principle to establish, for deportation purposes, a denaturalized person's alienage at the time of a conviction—and had been decided by the Second Circuit on that ground—it seems evident that the express relation-back provision adopted in response to that decision was intended to apply for that purpose.

B. At the time the relation-back provision was added, there was already in the bill, and in the Act as passed (§ 340(f)), a section providing affirmatively for the consequences of denaturalization upon the derivative citizenship of the wife and children of a denaturalized alien. Since those consequences were no longer left dependent upon the implications of a relation-back principle, they cannot, as petitioner argues, be the explanation for the inclusion of the relation-back provision.

C. We do not contend that the relation-back provision, any more than any other statute, can be mechanically applied without regard to its purposes or the consequences produced. Surely its most basic purpose, however, was to assure that an alien who obtained his naturalization by fraud, and was later denaturalized, would not derive any special benefit or profit from his fradudulently-acquired status, for a

time, as a "citizen." And the minimum recognition that can be given to that purpose, we submit, is to hold that the provision forestalls the invocation of a fraudulently-acquired naturalization as a shield against deportation for acts for which the alien would otherwise be deportable and which, being crimes whatever the perpetrator's status, were not themselves influenced by the outstanding naturalization.

ARGUMENT

I

SECTION 241(a)(4), IN DIRECTING THE DEPORTATION OF ALIENS TWICE CONVICTED OF CRIMES INVOLVING MORAL TURPITUDE, DOES NOT EXEMPT CONVICTIONS ENTERED WHILE THE ALIEN HELD A FRAUDULENTLY-PROCURED CERTIFICATE OF NATURALIZATION.

Section 241(a)(4) of the Immigration and Nationality Act of 1952 provides that:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry * * *, or who at any time after entry is convicted of two crimes involving moral turpitude * * *.

With petitioner's naturalization having been revoked on the ground of fraud in its procurement, he is admittedly now an "alien in the United States" potentially subject to deportation. Having been convicted for income tax evasion for two years, he has also

admittedly [1] been convicted, after entry, of two crimes involving moral turpitude. In our view, and as the court of appeals held, those two elements suffice to establish petitioner's deportability under § 241(a)(4). That is to say, we interpret § 241(a)(4) to mean: "Any person who is subject to deportation as an alien shall be deported who at any time after entry is convicted of two crimes."

Petitioner contends, however, that § 241(a)(4) should be interpreted so as not to "count" for deportation purposes any conviction had while a certificate of naturalization, albeit fraudulently procured and later revoked, was outstanding. Textually, the argument is that the language, "Any alien * * * who * * * is convicted," requires that the person sought to be deported have been an "alien" on the date of the convictions as well as at the time of deportation, and that a person holding a naturalization certificate, even though fraudulently procured and later set aside, is not for that purpose an "alien." Petitioner would thus read § 241(a)(4) as though it said: "Any person who is subject to deportation as an alien shall be deported who, while an alien and at any time after entry, is convicted of two crimes."

While our reading of the statutory language is, we believe, much the more natural one, we do not contend that the question can be answered merely by a parsing of the words of the statute—or by bare asser-

[1] Though under compulsion of this Court's limitation of the grant of certiorari to exclude any question going to the nature of the convictions (R. 137).

tions that one reading or another is "self-evident" and the statute "permits" no other (Pet. Br. 7, 12). The process of interpretation does not stop with the words of the statute read in isolation. What is wrong with petitioner's interpretation is not so much that the words cannot be made to perform the service petitioner demands of them but that, as we will show, the result of so reading them cannot be rationalized with any purpose reasonably attributable to Congress. Indeed, his reading of the statute produces arbitrary discriminations and inconsistencies which Congress plainly could not have intended.

A. POSSESSION OF A CERTIFICATE OF NATURALIZATION ON THE DATE OF THE CONVICTIONS HAS NO LOGICAL RELEVANCE TO THE PURPOSE OF SECTION 241(a)(4) TO REMOVE FROM THE COUNTRY THOSE ALIENS WHOSE CONTINUED PRESENCE IS CONSIDERED TO BE UNDESIRABLE BECAUSE OF THEIR DEMONSTRATED CRIMINAL PROPENSITIES

The purpose of deportation is not to punish the alien for his prior acts—in which event status at the time of the acts might be relevant—but to remove from the country those who, as aliens, remain here at the pleasure of Congress and whose continued presence Congress, in the exercise of its acknowledged prerogatives in dealing with aliens, does not consider desirable. The tests of deportability prescribed in § 241 are thus but standards of the desirability of the alien's continued presence. In § 241(a)(4), then, the relevance of the fact of conviction for two crimes involving moral turpitude—and the only relevance of the fact—is that in the Congressional judgment multiple convictions demonstrate a criminal propensity making the alien undesirable. The purpose, as explained by

the sponsors of the predecessor to § 241(a)(4) in the Immigration Act of 1917 (§19, 39 Stat. 874) was to rid the country of any alien who, by being convicted a second time, "showed then a criminal heart and a criminal tendency" or demonstrated himself to be "a criminal of the confirmed type."[2]

If the function of the two-conviction standard is to establish the alien's confirmed criminal characteristics and hence undesirability—as the history shows it is—what bearing has the fact that the alien was a naturalized "citizen" at the time of the convictions? Do the convictions say less about the man because he also held, when convicted, a fraudulently-procured certificate of naturalization? The answer, obviously, is that the alien's criminal propensities and hence undesirability are equally demonstrated by his convictions whatever his nominal "citizenship" status at the time, and to make deportability turn upon the lost

[2] The bill that became the 1917 Act (H.R. 10384, 64th Cong., 2d Sess.) originally provided for deportation only for convictions for crimes committed within five years after entry. The extension to include multiple convictions whenever occurring was offered on the floor of the House by Congressman Sabath, who explained that the Congress should have no desire "to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted" (53 Cong. Rec. 5167). Congressman Burnett, who was in charge of the bill on the floor, explained the premise of the amendment as being "that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency and they should be deported" (*id.* at 5168). The Senate committee report explained the provision as providing for the deportation of "a criminal of the confirmed type" (S. Rep. No. 352, 64th Cong., 1st Sess., p. 15).

status is to make it turn upon a circumstance having no logical relevance to the purpose to be served.

B. PRE-DENATURALIZATION CONDUCT WOULD, UNDER PETITIONER'S INTERPRETATION, BE BASIS FOR DEPORTATION UNDER SOME OF THE DEPORTATION PROVISIONS BUT NOT OTHERS, A DIFFERENCE FOR WHICH THERE IS NO JUSTIFYING RATIONALE.

Petitioner's argument, as he repeatedly proclaims, turns upon the use in § 241(a)(4) of the word "is" rather than "has been", "shall have been", or the like. As petitioner also notes (Br. 17–18), most of the other grounds for deportation based on past conduct are stated in the past tense. Petitioner uses that circumstance to assert that the use of "is" in § 241(a)(4) was a purposeful deviation designed to require that for purposes of § 241(a)(4), *unlike the other provisions*, the deportee have been an alien at the time of the act or event on which deportation is based. What it proves, we submit, is the opposite, for no shred of justification can be found or hypothesized for the resulting distinction between the grounds of deportation applicable to denaturalized aliens (*i.e.*, for pre-denaturalization conduct) and those which are not.

Under petitioner's interpretation, a denaturalized alien could, for example, admittedly be deported for the following conduct or events occurring while he was naturalized: engaging in certain subversive activities (§ 241(a), ¶ 7); being a drug addict (¶ 11); being convicted of a narcotics violation (¶ 11); being connected with the management of a house of prostitution (¶ 12); being convicted of carrying a sawed-off shotgun (¶ 14); being convicted of violating the provisions of the Alien Registration Act (¶¶ 15, 16); being

convicted of violating various wartime statutes (¶ 17); or being convicted of importing an alien for immoral purposes (¶ 18). Yet because of a shift of tense in the wording of the ground for deportation, petitioner contends that he cannot be deported, under the fourth paragraph of the same subsection, for his conviction for two crimes involving moral turpitude. Why Congress did, or conceivably might, single out that one ground for deportation and make it, unlike all the rest, inapplicable to pre-denaturalization conduct, petitioner does not even attempt to explain.

The fact, of course, is that there is no possible reason for a difference among the grounds for deportation in their application to pre-denaturalization conduct. Even less is there any indication in the legislative history that a difference was intended. Petitioner's reading of § 241(a)(4) thus introduces a wholly fortuitous and arbitrary distinction in the grounds of deportation applicable to denaturalized aliens.

What a comparison of § 241(a)(4) with its neighbors really shows, we submit, is that the variations of wording in referring to past conduct reflect only a difference of style—attributable in part, no doubt, to the different antecedents of the several provisions.[3]

[3] The Immigration and Nationality Act of 1952 stemmed from a two and one-half year study of the entire immigration system conducted by the Senate Committee on the Judiciary. As a result of this study, the Committee developed one complete "omnibus" bill which embodied the "patchwork" of prior immigration and naturalization laws. See S. Rep. No. 1515, 81st Cong., 2d Sess., at 1–4. In preparing the bill, the committee made a special point, according to its chairman, Senator McCarran, not to make changes in existing law "for the sake of

That Congress attached no significance to the tenses is also confirmed by the 1950 report by the Senate Committee on the Judiciary on its study of the immigration and nationality laws, where in describing the provision of existing law for the deportation of multiple offenders and recommending its retention the Committee repeatedly used the past tense, notwithstanding that both the existing law and the bill simultaneously introduced by its chairman, like the Act as passed, used the present-tense "is."[4] If that word

---

change", "especially since throughout the years there has been built up a body of judicial and administrative interpretations" that should not be disturbed. Joint Hearings before the Subcommittee of the Committees of the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., p. 3; 82 Cong. Rec. 5089.

The result of that approach to the writing of the Act is perhaps particularly apparent in § 241(a), which—as a reading of it will readily reveal—represents a collection of numerous provisions for deportation which had been enacted by various Congresses over the period from 1917 through 1940. Section 241(a)(4) derives from § 19 of the Immigration Act of 1917, 39 Stat. 874, and, although fairly completely rewritten, its use of "is" may be attributable to the fact that the 1917 Act used the phrase, "is hereafter sentenced." The "shall have been convicted" phrasing of § 241(a)(14), (15), and (16) is much more easily traced, coming directly from § 20(b) of the Alien Registration Act of 1940, 54 Stat. 672. As another example, the "has been or may hereafter be convicted" language of § 241(a)(17) is a clear carryover from the Act of May 10, 1920, § 1, 41 Stat. 593.

[4] The existing law, § 19 of the Immigration Act of 1917, 39 Stat. 874, referred to any alien "who is hereafter sentenced * * * more than once * * * at any time after entry." The bill developed by the committee and introduced by its chairman on the same day the committee's report was filed, used language identical to § 241(a)(4) as enacted (S. 3455, 81st Cong., 2d Sess).

had the crucial significance petitioner claims for it, Congress was unaware of it.

A further answer to petitioner's insistence that "is" in § 241(a)(4) does not encompass "has been" is that this Court has held precisely to the contrary on the question for which the tense used would seem clearly to have its primary, if not only, significance—namely, whether the provision, stated in the present tense, applies to convictions occurring prior to its enactment. *Lehmann* v. *Carson*, 353 U.S. 685. If "is" was used in a comprehensive sense including "has been" for the purpose for which the tense is primarily important—to describe the *time* of the convictions—it seems hardly possible to infer from the use of "is" in contrast to "has been" a purpose by Congress to make a radical distinction between that provision and its companions on a matter—the necessity of alienage at the time of the event—on which tense would seem at best to have only an indirect bearing. It is, after all, the very same word in the very same statute that is being construed, and if this Court has said that "is" means "has been" for one purpose (time of the conviction), the structure petitioner has built, for another purpose (alienage at the time of the conviction), upon the as-

---

Yet the report, after several times using the past tense in summarizing the existing law, concludes with the recommendation that "the deportation provisions with respect to *aliens who have been convicted* of a crime involving moral turpitude should be retained in the law with some modification" (S. Rep. 1515, 81st Cong., 2d Sess., p. 391, emphasis added), a recommendation that was presumably thought to have been carried out by the "alien * * * who * * * is convicted" language of the committee's bill.

sertion that "is" cannot mean "has been" must indeed rest upon a weak foundation.[5]

---

[5] Petitioner relies, in support of the implications he finds in the use of "is", on *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C.A. 9), certiorari denied, 346 U.S. 876. Mangaoang was a Filipino and, as such, a "national" of the United States until 1946 when, with the advent of Philippine Independence, he automatically became an alien. He was a member of the Communist Party during 1938–1939. Because of that membership, he was sought to be deported, after he had become an alien, under a provision of the Internal Security Act of 1950 (§ 22, 64 Stat. 1006, cf. § 241(a)(6)(C) of the Immigration and Nationality Act of 1952) providing in relevant part for the deportation of:

"Aliens who, at any time, * * * shall have been members of any of the following classes: * * * (C) Aliens who are members of * * * the Communist Party * * *."

The court interpreted that statute as requiring that the deportee be an alien and a Party member at the same time and held that Mangaoang, since he was a Party member only in 1938–1939 and not an alien until 1946, was not deportable. Whatever the merits of that decision, the statute poses a problem of interpretation very different from that involved here. The difficulty lies in the effect to be given to the double reference—in effect, "aliens who shall have been aliens who are". Mangaoang may have been an "alien who was a member" but it can be argued that he was not an "alien who was an alien who was a member." At least one way to give meaning to the double reference is to read the first clause as requiring the second clause to be applied from a contemporaneous point of view—i.e., by reading the first clause as making a reference back to a concrete time. Thus, substituting in Mangaoang's case "1938–1939" in the place of "at any time", the first clause would read: "Aliens who, at any time (that is, in 1938–1939), * * * shall have been members of any of the following classes: * * *" In turn, it is plain that *in 1938–1939* Mangaoang was in fact not a member of class (C), "Aliens who are [Party] members", since he was not then an alien. But however that labyrinth is to be resolved, it is plain than it turns on problems unique to that statute and is of no help to petitioner here.

C. PETITIONER'S ARGUMENT WOULD CREATE AN IRRATIONAL PREFERENCE IN FAVOR OF ALIENS WHO PROCURE NATURALIZATION CERTIFICATES BY FRAUD.

Were there no other objection to petitioner's reading, it would be a sufficient cause to reject it that it gives a preference to persons guilty of fraud. Had petitioner not been naturalized, he would admittedly be deportable for his conviction of two crimes involving moral turpitude. He claims immunity from deportation solely because he fraudulently procured and held for a time a certificate of naturalization. He contends, in short, that Congress intended to prefer aliens who by fraud obtain naturalization certificates over those innocent of fraud. Since, if anything, two convictions plus one fraud demonstrate an alien's undesirability even more conclusively than do two convictions alone, there is no possible reason, we submit, why Congress would have intended to accord denaturalized aliens such an irrational preference.

D. PETITIONER'S INTERPRETATION IRRATIONALLY MAKES DEPORTABILITY TURN UPON THE ALIEN'S PRIOR STATUS AT THE TIME OF THE CONVICTIONS RATHER THAN AT THE TIME OF THE COMMISSION OF THE ACTS.

Under petitioner's interpretation of § 241(a)(4) as being dependent upon the prior status of the alien, the prior status that is made determinative is his status at the time of the convictions, not at the time of the commission of the crimes. We submit that if Congress had intended a certificate of naturalization, even though fraudulently obtained, to serve as a shield to deportation for events taking place while it was outstanding, it would have made the date of the commis-

sion of the acts, not the date of the conviction, controlling. The only rationale for making prior status relevant would be that Congress wished, despite the fraud in procurement, to give full effect to the denaturalized alien's status, for a time, as a "citizen" and to that end immunize him from deportation consequences for anything he might have done while acting under the "protection" of that status. That rationale, however, would obviously require that status on the date of commission of the acts be determinative. Making status on the date of conviction controlling—so that, for example, a naturalized citizen who commits two crimes, is denaturalized, and is then convicted may be deported notwithstanding his prior status*—would be wholly irrational. That petitioner's interpretation necessarily produces that irrational consequence confirms that it could not have been intended.

B. THE DECISION OF THIS COURT IN EICHENLAUB V. SHAUGHNESSY, CONSTRUING SUBSTANTIALLY IDENTICAL LANGUAGE IN A PRIOR ACT, CONTROLS THIS CASE.

Neither the issues presented by petitioner nor his arguments are new. They have been authoritatively answered by this Court in *Eichenlaub* v. *Shaughnessy* (together with *Willumeit* v. *Shaughnessy*), 338 U.S. 521.

* If, indeed, the original proceedings to denaturalize the petioner brought in 1952 had been successful (see *United States* v. *Costello*, 145 F. Supp. 892, reversed, 247 F. 2d 384 (C.A. 2), reversed, 356 U.S. 256) that is precisely the posture petitioner would now be in. It is only the fortuitous circumstance that the convictions were, as it happened, obtained before the denaturalization that makes petitioner's present argument possible.

Eichenlaub and Willumeit were naturalized in the 1930's; they were convicted in 1941 and 1942 of violations of the Espionage Act; and their naturalization certificates were cancelled for fraud in 1944. The question was whether they were deportable under the Act of May 10, 1920, 41 Stat. 593, which, speaking as of its enactment in 1920, provided for the deportation of:

> *All aliens who* since August 1, 1914, have been or *may hereafter be convicted* of any violation [of the Espionage Act, among others] * * *.

Seizing upon the language italicized above—the applicable language since the convictions occurred after the 1920 Act[3]—the petitioners made exactly the same argument that is made here.[4] Rejecting the argument, this Court held that all that the use of the word "aliens" in the introductory phrase required was that

---

[3] If petitioner means to imply (see Pet. Br. 12–13) that the *Eichenlaub* decision turned upon the branch of the statute phrased in the past tense ("aliens who since August 1, 1914 *have been* * * * convicted"), he is plainly in error. That phrase applied only to those convicted between August 1, 1914, and the date of enactment of the Act, May 10, 1920. Eichenlaub and Willumeit were convicted, respectively, in 1941 and 1942.

[4] *E.g.*, Brief for the Petitioner, *Willumeit* v. *Shaughnessy*, No. 82, Oct. Term, 1949, p. 7: "The language shows that the alien must be an 'alien' at the time that he 'may * * * be convicted.' The use of the words 'aliens who may *be*' convicted indicates that the alien must '*be*' an alien at the time of conviction. There is no other grammatical possibility." The government's brief replied to the argument at length. Brief for the Respondent, pp. 6–10.

"all persons to be deported * * * shall be 'aliens'" (p. 528), not that (p. 530):

> * * * the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. * * *

The significance of the *Eichenlaub* decision to this case derives not only from the substantial identity of the language involved—there, "All aliens who * * * may hereafter be convicted"; here, "Any alien * * * who * * * is convicted"—but also from the direct applicability to this case of the Court's reasoning. In an opinion largely paralleling the points we have made above, the Court said:

> The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but would prohibit the Attorney General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favor of any aliens because they were at one time naturalized citizens, the logical time at which that status

would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute. [pp. 530–531]

* * * * * *

* * * If the Act of 1920 had been intended to initiate the distinction here urged by the relators, it is likely that the change would have been made by express provision for it. We find nothing in its legislative history that suggests a congressional intent to distinguish between two such groups of undesirable criminals. [p. 532]

* * * It is hardly conceivable that, under those circumstances [*]; Congress, without expressly saying so, intended to prevent * * * [the deportation of] alien offenders merely because they had received their respective convictions at times when they held certificates of naturalization, later canceled for fraud. To do so would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it. * * * [p. 532]

---

[*] *I.e.*, in the light of legislative history showing that the Act, although framed in general language, was particularly occasioned by a purpose to deport, among others, a specific group of aliens then interned as dangerous enemy aliens and others who had already been convicted. See 338 U.S. at 532. To that extent, there is a difference between the legislative history of that provision and the one involved here. However, the history showing that the purpose of § 241(a)(4) was to rid the country of aliens who, because of their confirmed criminal propensities, were deemed undesirable (see pp. 10–12, *supra*) supplies an equivalent element here.

Those arguments are as sound today as they were then, and, as we have shown, they apply with equal force to § 241(a)(4) of the 1952 Act.

F. SECTION 241(b) PROVIDES NO REASON WHY PETITIONER'S CONVICTIONS SHOULD NOT BE MADE A BASIS FOR HIS DEPORTATION

Apart from his reliance on the tense used in § 241(a)(4), the sole argument made by petitioner is one based on the asserted implications of § 241(b) of the Act. That provision, derived from § 19 of the 1917 Act,[10] provides in part that:

> The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply * * * (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported * * *.

Petitioner argues that, because he held a naturalization certificate at the time of his convictions, he was barred from invoking the sentencing court's equitable powers to grant him immunity from deportation under that provision; and that, because he was barred from seeking an immunizing recommendation, his convictions should not be counted for purposes of § 241(a)(4).

---

[10] Immigration Act of 1917, 39 Stat. 874. The origin of the provision in the 1917 Act makes frivolous petitioner's otherwise insubstantial suggestion that § 241(b) might in some way have been in "answer" to "the problem posed by the *Eichenlaub* dissent" (Br. 24, n. 18).

The argument is insubstantial. Even assuming that the outstanding naturalization certificate prevented petitioner from seeking a recommendation, his disability was, after all, the product of his own fraud. It can hardly be inferred that Congress intended to give to those precluded by their own fraud from *asking* for a recommendation the full benefit (by automatically discounting their convictions) of a *grant* of a recommendation, putting only on non-fraudulent aliens the burden of showing cause for leniency. The privilege accorded is essentially an appeal to the equitable discretion of the court, and if the "clean hands" doctrine and the principle that "he who seeks equity must do equity" are not literally applicable, they at least suggest a norm that should quickly dispose of the extraordinary interpretation petitioner urges.

Nor is petitioner helped by the decision in *Gubbels* v. *Hoy*, 261 F. 2d 952 (C.A. 9), whatever its own merits. The decision there was, analytically, an interpretation of the word "convicted" as used in § 241 (a)(4) and was cast in terms of the nature of the tribunal rendering the judgment, the court holding that the judgments of military courts-martial were not "convictions" within the meaning of § 241(a)(4). It may be granted that the main, if not the only, justification given by the court for its interpretation was that court-martial proceedings were not adapted to exercising the power given by § 241(b), but in no sense did the court announce a rule at large that in any case in which the defendant was precluded, for whatever reason, from requesting a § 241

(b) recommendation the conviction was not to count for deportation purposes. We do not deny that the general non-availability of § 241(b) in a class of proceedings might be relevant—as one of many relevant circumstances—as an aid to the interpretation of some other provision, but it cannot itself be the source of a general "rule" of the sort for which petitioner contends."[11] We point out, finally, that in *Gubbels* the court's concern was with the inability of servicemen as a class, and through no fault of their own, to obtain such recommendations, and the resulting discrimination between them and civilians. Here, petitioner's alleged disability results from his own fraud, and the only discrimination involved is that which would result under petitioner's interpretation in favor of fraudulent aliens over non-fraudulent aliens.

In all events, it is not true, we submit, that petitioner was barred from requesting a § 241(b) recommendation. Granted that the provision applies in terms only to "aliens," a person holding a fraudulently-obtained certificate of naturalization would be an "alien" for this purpose (see Point II, *infra*), and one whose status was doubtful could quite properly request the court to make a conditional or "protective" recommendation without in any way abandon-

[11] See *Circella* v. *Neelly*, 115 F. Supp. 613 (N.D. Ill.), affirmed, 216 F. 2d 33 (C.A. 7), certiorari denied, 348 U.S. 817, rejecting an argument that an alien could not be deported on the basis of a pre-1917 conviction because the immunizing-recommendation power, first provided for in the 1917 Act, was not available at the time of his conviction.

ing his claim that his naturalization was valid. And particularly is that true in petitioner's case, for proceedings (ultimately abortive [12]) for his denaturalization were in fact pending at the time of his convictions in 1954.

II

SECTION 340(a), WHICH PROVIDES THAT AN ORDER CANCELLING A CERTIFICATE OF NATURALIZATION FOR FRAUD "SHALL BE EFFECTIVE AS OF" THE DATE THE CERTIFICATE WAS ISSUED, PRECLUDES THE INVOCATION OF PETITIONER'S CANCELLED "CITIZENSHIP" AS A DEFENSE TO HIS DEPORTATION BASED ON HIS CONVICTION, WHILE HOLDING THE FRAUDULENTLY-PROCURED NATURALIZATION CERTIFICATE, OF TWO CRIMES INVOLVING MORAL TURPITUDE.

We have shown in Point I that, even standing alone, § 241(a)(4) does not exempt from deportation aliens who, when convicted of their crimes, happened to hold fraudulently-procured certificates of naturalization that had not yet been revoked. We will show in this Point that whatever doubts may exist about the effect of § 241(a)(4) standing alone are put to rest by the interaction with that provision of the direction in § 340 (a) of the Act that a denaturalization for fraud "shall be effective as of the original date" of the naturalization.

Section 340(a) of the Act authorizes proceedings to be brought against a naturalized citizen:

> * * * for the purpose of revoking and setting aside the order admitting such person to citizen-

[12] See note 6, *supra*.

> ship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and *such revocation* and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization *shall be effective as of the original date of the order and certificate,* respectively * * *. [Emphasis added.]

It was under that provision that petitioner was denaturalized and the cancellation of his naturalization certificate was accordingly "effective as of" 1925, the date of his naturalization. By the literal terms of the statute, therefore, petitioner must now be deemed to have always been an "alien", including, of course, at the time of his convictions in 1954. It follows, if the words of the statute are to be given their natural meaning, that petitioner is deportable under § 241(a)(4) regardless of whether that provision requires alienage at the time of the convictions.

Despite the unlimited wording of the "relation-back" provision, however, petitioner contends that its only purpose was to cause a naturalized citizen's wife and children, upon his denaturalization, also to lose their derivative citizenship, and that it should accordingly not be applied for deportation purposes—*i.e.*, to deprive him of his asserted defense against deportation as a multiple offender that he was a "citizen" when convicted of his crimes. The basis for petitioner's inference as to the limited purpose of § 340(a) is his assertion that at the time of its enactment, as a codifica-

tion of existing law, the only cases applying the relation-back doctrine had done so in the derivative-citizenship context.

The short answer to petitioner's argument is that, even if his premise were correct (that the pre-statutory cases had applied the relation-back principle only in derivative-citizenship cases), the fact would remain that it was the principle, not the particular application, that was written into the statute. Petitioner's argument is, however, even more fundamentally fallacious, for, as we will show (A) not only had the lower courts applied the principle also for deportation purposes but it was a doubt about the principle raised by this Court *in a deportation case* that prompted its statutory ratification; (B) its effect upon derivative citizenship cannot explain the provision for the simple reason that it has no effect upon derivative citizenship; and (C) whatever limits there may be to the implications of the relation-back provision, its application here to prevent petitioner from profiting from his own fraud is the minimum effect that can be given to its underlying purpose.

A. THE HISTORY OF THE RELATION-BACK PROVISION SHOWS THAT IT WAS INTENDED TO APPLY TO DEPORTATION.

1. *Judicial background.*—Although revocation of naturalization certificates fraudulently obtained has been expressly authorized by statute since 1906,[13] no provision expressly governing its retroactive effect

[13] Act of June 29, 1906, § 15, 34 Stat. 601; Nationality Act of 1940, § 338(a), 54 Stat. 1158.

was enacted until the 1952 Act. In the interim came the judicial evolution of the relation-back doctrine.

The generally-accredited birthplace of the doctrine is *Johannessen* v. *United States*, 225 U.S. 227, 240–241, where the Court—although actually holding only that the provision of the 1906 Act authorizing cancellation of fraudulently-procured naturalization could constitutionally be applied to revoke previously-granted certificates—quoted with approval the comment of a lower court that one obtaining a grant of citizenship by fraud "takes nothing by his paper grant." Language implying that citizenship fraudulently obtained is a nullity appears also in *Luria* v. *United States*, 231 U.S. 9, 24.

The first real application of the principle that denaturalization for fraud is effective *ab initio* was, however, the 1932 decision of the Third Circuit in *Rosenberg* v. *United States*, 60 F. 2d 475, certiorari denied, 287 U.S. 645, holding that the revocation for fraud of a naturalization certificate also terminates any rights of citizenship derived from it (there, by a wife). But while the application was to derivative citizenship, the principle invoked was of much broader import: the reason the wife was no longer a citizen was that "she never could have been an American citizen, because she was not the wife of a naturalized man"; and the reason her husband was not "a naturalized man" was that "the certificate of naturalization was simply a paper fraud and conferred at the time of its grant no rights whatever" (60 F. 2d at

476).[14] In *Battaglino* v. *Marshall*, 172 F. 2d 979, certiorari denied, 338 U.S. 829, the Second Circuit similarly held—and for similarly broad reasons (see 172 F. 2d 981)—that denaturalization for fraud resulted also in the loss of derivative rights.

But while petitioner is correct that the *Rosenberg* and *Battaglino* cases, despite the generality of the principles invoked, actually involved applications of the relation-back principle only for derivative-citizenship purposes (Br. 26), he is in error if he means to imply that the pre-statutory developments ended there. Almost a year before the Second Circuit decided the *Battaglino* case (March 3, 1949), it had decided the *Eichenlaub* case (May 3, 1948)[15] and it had reaffirmed that decision in the *Willumeit* case (January 3, 1949)[16] still some months before the *Battaglino* decision. As our earlier discussion of the Supreme Court's decision in *Eichenlaub* and *Willumeit* indicates (pp. 18–22, *supra*), the question involved was substantially identical to that involved here—whether a denaturalized alien could be deported for a conviction while he was a naturalized "citizen." The Sec-

[14] See also *In re Findan*, 4 F. Supp. 189, 190 (D. R.I.), decided a year after *Rosenberg*, in which the court, although holding that derivative rights did not fall in the absence of actual fraud, stated that if actual fraud were present "the proceeding might then be regarded as a nullity from the beginning and the conclusion reached that no one could derive rights as a result of such fraudulent acts."

[15] *Eichenlaub* v. *Watkins*, 167 F. 2d 659, affirmed *sub nom. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521.

[16] *Willumeit* v. *Watkins*, 171 F. 2d 773, affirmed *sub nom. Willumeit* v. *Shaughnessy*, 338 U.S. 521.

ond Circuit, unlike the Supreme Court, decided the cases expressly on the basis of the relation-back doctrine, holding that even if alienage at the time of conviction was necessary "the decree of denaturalization relates back, at least for this purpose." ([redacted], 167 F. 2d at 660.)

Although Congress had given some recognition to the relation-back doctrine, at least by negative implication, by including in the Nationality Act of 1940 a provision *saving* derivative rights from loss upon denaturalization in certain circumstances (§ 338(d), 54 Stat. 1159), the relation-back doctrine had up to this point been a product solely of judicial development. The stage was set, however, for the legislative developments leading to the inclusion of an express relation-back provision in the Immigration and Nationality Act of 1952.

2. *Legislative development.*—Arranged in an order that allows for the inevitable time lag between judicial stimulus and legislative response, the crucial events leading to the adoption of § 340(a)'s relation-back provision were these:

(a) On April 20, 1950, having completed a two-and-a-half year comprehensive study of the immigration and nationality laws,[17] the Senate Committee on the Judiciary, under the chairmanship of Senator McCarran, published a massive, 925-page, report on the results of its study. S. Rep. 1515, 81st Cong., 2d Sess. The report stated as the committee's understanding

[17] The study had been authorized on July 26, 1947, by Senate Resolution 137, 80th Cong., 1st Sess.

of existing law that an order of denaturalization left the alien in the status of never having been a citizen and that any relief from that effect required a specific statutory reservation (like the derivative-rights "savings" provisions of the 1940 Act, *supra*) (*id.* at p. 755):

> The effect of a decree of denaturalization, as distinguished from expatriation or forfeiture of citizenship, is to declare that the "naturalized" person never was in fact naturalized, because either by fraud or illegality the statutory prerequisites were not met. The naturalization laws make certain reservations, saving the naturalization of children who derive citizenship from a parent from the alienage which they would otherwise incur because of the fraudulent or illegal naturalization.

Since they were the cases most directly supporting it, the committee's statement presumably was based on the authority of the long-standing decision of the Third Circuit in *Rosenberg* (1932) and the more recent decisions of the Second Circuit: *Eichenlaub*, decided more than two years before the report, and *Willumeit* and *Battaglino*, decided almost a year before. The report does not reflect the doubts about the doctrine raised by the Supreme Court's decision in *Eichenlaub* and *Willumeit*, but since that decision had been announced (on January 16, 1950) a bare three months before its publication, it is hardly likely—in view of the time required for the preparation of such a massive and comprehensive report—that it could have.

(b) Also on April 20, 1950, Senator McCarran introduced an "omnibus" bill that had been developed by the study committee to replace the existing "patchwork" of immigration and nationality statute laws, S. 3455, 81st Cong., 2d Sess. See 96 Cong. Rec. 5412, 5451–5452; S. Rep. 1515, *supra*, pp. 1–4. That bill—evidently reflecting the committee's satisfaction with the existing judicial gloss on the retroactive effect of denaturalization as stated in its report—contained no express relation-back provision. The bill did, however, contain a provision providing affirmatively for the consequences of denaturalization upon derivative rights (§ 339(f), identical to § 340(f) of the 1952 Act), so that at least those consequences were no longer left dependent upon the implications of the relation-back doctrine (as they were under the purely negative "saving" provisions of the prior law).

(c) On January 16, 1950—chronologically before the above events but too late to have influenced them—the Supreme Court announced its decision in the *Eichenlaub* and *Willumeit* cases, 338 U.S. 521. In that decision, the Court, although affirming the Second Circuit's decisions, did not, as the Second Circuit had, rely on the relation-back principle, but rather held, as we noted in Point I (pp. 18–22, *supra*), that the deportation statute there involved did not require alienage at the time of the convictions. What the Court did say about the relation-back question, however, has major significance here. The Court's comments on the

question, in full, were as follows (338 U.S. at 529–530):

> The one substantial issue is whether the Act requires that the relators not only must have been "aliens" at the times when they were ordered deported, but that they must also have had that status at the times when they were convicted of designated offenses against the national security. The Government suggests that one route to a conclusion on this issue is to hold that the relators, as a matter of law, were "aliens" when so convicted. The basis it suggests for so holding is that the judicial annulment of the relators' naturalizations on the ground of fraud in their procurement deprived them of their naturalizations *ab initio*. *Rosenberg* v. *United States*, 60 F. 2d 475 (C.A. 3d Cir.). They thus would be returned to their status as aliens as of the date of their respective naturalizations. Accordingly, they would come within the scope of the Act of 1920, even if that Act were held to require that all offenders subject to deportation under it also must have had an *alien status when convicted* of the designated offenses.
>
> In our opinion, it is not necessary, for the purposes of these cases, to give a retroactive effect to the denaturalization orders. A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. * * *

Two things are significant about those comments. First, as the Court phrased the issue, the question

went to the general validity of the relation-back principle, not to whether the principle, if generally valid, was applicable for deportation purposes. Second, by expressly framing the question and then refusing to decide it, the Court implied that the principle that denaturalization took effect *"ab initio"* or had "a retroactive effect," which the committee's study report had taken as settled, was not settled at all.

(d) At the next session of Congress, Senator McCarran introduced a new bill (S. 2055, 82d Cong., 1st Sess.) the provisions of which had been "further refined" as a result of the committee's continuing study.[18] That bill was introduced on August 27, 1951, over a year and a half after the Supreme Court's *Eichenlaub* and *Willumeit* decisions. Although it was otherwise identical to the prior bill in all respects material here, the new bill included for the first time the provision ultimately adopted[19] in § 340(a) expressly directing that a revocation of naturalization "shall be effective as of the original date of the order and certificate."

3. *Implications of the legislative developments.*— The implications of the legislative development of

[18] See Joint Hearings before the Subcommittee of the Committees of the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., pp. 2–3, which, although not touching explicitly on the point involved here, explains generally the evolution of the bills leading to the Act.

[19] The provisions of S. 2055, with further slight revisions, were lated incorporated into companion bills, S. 2550 and H.R. 5678, 82d Cong., 2d Sess., and the House bill was then enacted into law.

§ 340(a) are self-evident. In the first place, it is not true (cf. Pet. Br. 26) that there were no prior cases applying the judicial relation-back doctrine for deportation purposes. The Second Circuit decisions in *Eichenlaub* and *Willumeit* applied it in precisely the context involved here, and they were two of the only four cases (actually antedating the fourth, *Battaglino*, upon which petitioner relies, Br. 26) that can be said to have supported the committee's statement of the prior law. Even more important, however, the chronology of the belated addition of the provision to the evolving bills suggests irresistibly that its addition was specifically prompted by the doubts newly raised about the doctrine by this Court's opinion in *Eichenlaub* and *Willumeit*. As petitioner says (Br. 24, n. 18), "Congress was aware of what was said [by the Supreme Court] in *Eichenlaub* when it enacted the 1952 Act." Since the Court's opinion did in fact give good cause to regard the question, despite the uniform lower court decisions, as remaining "unsettled", it gave every reason to Congress, engaged in a comprehensive restatement of the law of immigration and nationality, expressly to resolve the matter. It did so in § 340(a) of the Act.

If, in turn, this Court's *Eichenlaub-Willumeit* opinion was the occasion for adding the provision, no doubt can be harbored that the provision was intended to have the consequence, at a minimum, of precluding a denaturalized alien sought to be deported because of his criminal convictions from invoking his cancelled naturalization as a defense on

the ground that he was not an "alien" at the time of the convictions. For it was precisely that use of the cancelled certificate that was sought to be made in *Eichenlaub-Willumeit* and which this Court chose not to decide. At least from the face of the opinion, moreover—and for present purposes it is what was said, not its merit, that is controlling—the Court chose to rely on another ground not because of any doubts about whether the principle would *apply* in that context but because it preferred not to have to decide the validity of the *principle* itself. The Court's opinion thus posed the question for Congress specifically in this context and on the apparent assumption that the answer to it would be dispositive of that case (and hence this case). With the question thus framed, Congress answered it in no less definitive terms. The dialogue between Court and Congress was direct and sharply defined, and, if by the enactment of the relation-back provision of § 340 (a) Congress did not succeed in preventing the use petitioner seeks to make of his cancelled naturalization, it cannot be on the ground that that was not the Congressional will.

B. THE RELATION-BACK PROVISION HAS NO CONSEQUENCE FOR DERIVATIVE-CITIZENSHIP PURPOSES, MAKING LESS THAN ADEQUATE PETITIONER'S EXPLANATION THAT THAT WAS ITS SOLE INTENDED CONSEQUENCE.

Not only is petitioner demonstrably wrong in his assertion that the relation-back provision was not intended to apply for deportation purposes, but his explanation of the provision as serving only to assure

the derivative loss of derivative rights is in fact no explanation at all. At the time the relation-back provision was added, as we have noted, there was already in the bill (and in § 340(f) of the Act as passed [20]) a separate provision affirmatively prescribing, without reliance upon the implications of a general relation-back principle, the consequences of denaturalization upon derivative citizenship (see S. 3455, *supra*, § 339(f)). The effect of denaturalization upon derivative citizenship was thus the one consequence for which there was no longer any need to invoke—or legislate—a relation-back principle. If, therefore, the relation-back provision of Section 340(a) had any purpose at all—as we must assume it did—it must have been meant to have an impact on matters other than derivative citizenship. And what that impact might be, unless it be upon status for deportation purposes, petitioner does not suggest.

C. WHATEVER LIMITS THERE MAY BE ON THE IMPLICATIONS OF THE RELATION-BACK PROVISION, ITS APPLICATION HERE IS THE MINIMUM CONTENT THAT CAN BE GIVEN TO IT.

The basic purpose of the relation-back provision was to assure that a denaturalized alien would not continue to benefit from his fraudulently-procured citizenship. While the extent to which it might operate to make a denaturalized alien worse off than if he had never been naturalized may be doubted, it

[20] Section 340(e) of the Act, which is in the form of the old "savings" provision of the 1940 Act, applies only to denaturalization under the prior acts, not to those under Section 340(a), where the relation-back provision appeared for the first time.

was surely intended to prevent his being better off. And the very minimum application of that principle, we submit, is to forestall the invocation of fraudulently-acquired naturalization as a shield against deportation for acts for which the alien would otherwise have been deportable and which were not themselves influenced by the outstanding naturalization.

We do not argue, we wish to emphasize, that an alien whose naturalization has been revoked under § 340(a) is in exactly the same position, for all purposes, as one who had never been naturalized. The relation-back provision obviously cannot be so mechanically applied, without regard to its purposes or the consequences produced. It would be plainly absurd, for example, to charge a person who traveled on an American passport while he held a certificate of naturalization with having reentered the country without the proper documents (*i.e.*, an entry visa as an alien) because his naturalization was later revoked. See *Matter of C* ———, 3 I. & N. Dec. 275, quoted at Pet. Br. 34–35, a pre-1952 Act decision rejecting such an application of the judicial relation-back doctrine.

A closer question is whether a person who travels abroad and returns while holding a naturalization certificate should, because of his later denaturalization, be deemed to have made an "entry" at that time (for purposes, *e.g.*, of establishing deportability on the basis of a conviction for a single crime com-

mitted within five years of "entry," Section 241(a)(4), or on the basis of pre-"entry" conduct). "Entry" is defined as the coming into the country of an "alien" (Section 101(a)(13)) and, because of the many grounds for deportation turning upon the time of entry, is an act fraught with serious consequences for an alien, placing in jeopardy whatever status he may have acquired by his prior residence here. At the same time, a sojourn abroad is an act having no consequence for a citizen. Accordingly, the status of the person at the time of the action, as alien or citizen, has a direct and important bearing on whether the action is taken. That being so, there is plainly an element of unfairness in holding that a person who travelled abroad in reliance upon an outstanding naturalization certificate—an act thought to be without consequence—in fact made a new "entry" which placed in greater jeopardy his right to remain in the country. Since an alien not holding a naturalization certificate might well have refrained from leaving the country rather than risk the consequences of a new entry, such an application of the relation-back principle would not merely prevent the alien from benefiting from his fraud; it would, in a sense, make him *worse* off than he would have been had he never been naturalized. For those reasons, the decision in *Brancato* v. *Lehmann*, 239 F. 2d 663 (C.A. 6), upon which petitioner so heavily relies (Br. 26–27)—holding that a coming into the country by a naturalized

citizen is not made an "entry" by his later denaturalization—seems to us an entirely reasonable one."[21]

But from the fact that the relation-back provision cannot be mechanically applied to every situation and for every purpose it does not follow, as petitioner seems to suggest, that it should be given no effect at all. The solution must rather be to seek out its basic purpose and confine its application to those circumstances in which that purpose would be effectuated. The basic object of the provision, it seems evident, was to assure that an alien who was found to have obtained his naturalization by fraud, and was accordingly denaturalized, would not derive any special benefit or profit from his fraudulently-acquired status,

---

[21] The only other case on which petitioner relies is *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C.A. 9), certiorari denied, 346 U.S. 876 (see Pet. Br. 27–29). The case is not in point. A 1934 statute had provided that Filipinos, though "nationals" of the United States, "shall be considered as if they were aliens" for purposes of the laws "relating to the immigration, exclusion, or expulsion of aliens." A 1950 statute (the Internal Security Act) contained a provision directing the deportation of certain "aliens." All the court held (if surprisingly) was that the word "aliens" as used in the later statute was intended to include only real aliens, not "constructive" aliens under the 1934 statute—a holding, in effect, that the later statute impliedly rejected (as of course Congress had the power to do) the application of the earlier one for its own purposes. Even accepting petitioner's misstatement of the case—the case did not hold that the Filipinos were to be considered as aliens only for purposes other than deportation (Pet. Br. 29); they were admittedly subject to all prior deportation laws and the court held only that the specific 1950 statute was not intended to apply to them—we are unable to understand its supposed relevance to this case.

for a time, as a citizen. And it is precisely such a benefit that petitioner claims here.

Had petitioner never been denaturalized, he would admittedly now be deportable under Section 241(a)(4) on the basis of his two convictions for income tax evasion. Nor did his nominal status as a citizen at the time of the acts influence either the performance of the acts or their criminality.[22] Yet despite the irrelevance of the fact of naturalization to the occurrence of the events forming the grounds for deportation, petitioner claims to be immune from deportation because he held a naturalization certificate, albeit fraudulently procured, at the time of his convictions. He claims, in effect, that his fraudulent attempt to obtain citizenship, even though detected, should be made a success at least to the extent of giving him a "citizenship" defense to the consequences of his crimes. It was precisely such attempts to derive a special advantage from one's own fraud, we contend, that the relation-back provision was intended to forestall. If that provision is to be given any effect, the conclusion must be, we submit, that, since the revoca-

[22] The only way in which petitioner even claims that the fact of naturalization might have influenced the events is that he was thereby disabled from seeking a recommendation against deportation from the sentencing court under Section 241(b). But as noted above (pp. 22–25), it was petitioner's own fraud that placed him in that position, and it would surely make the tail wag the dog automatically to give him the benefit of favorable recommendations (by ignoring the convictions) because his previous fraud made it awkward for him to apply.

tion of petitioner's naturalization was "effective as of the original date of" his naturalization, he was not a "citizen" at the time of his conviction for purposes of Section 241(a)(4).[23]

[23] It is appropriate that we allude briefly to the implications the arguments in this case might have upon expatriated, as distinguished from denaturalized, citizens. In the *Eichenlaub* case, this Court expressly left open the question whether the rule announced would be applicable to expatriated persons (338 U.S. at 528–529, n. 14). The question would similarly be left open by the arguments we have made in this case. That is obviously true of the argument based on the relation-back provision of § 340(a) (Point II). To show that it is also true of the argument based on § 241(a)(4) (Point I), we will briefly suggest the nature of the issues on which the deportability of expatriates would turn.

Since only an "alien" can make an "entry" (§ 101(a)(13)), native-born citizens would not be deportable, despite their expatriation, under any of the grounds premised, as most of them are, upon the existence of an "entry." There would be a question, of course, whether pre-expatriation conduct would be grounds for *exclusion* (and subsequent deportability based on excludibility, § 241(a)(1)) if, after expatriation, an expatriate sought to reenter the country, but exclusion and deportation may involve quite different considerations. As to a naturalized citizen who had made an "entry" prior to naturalization, there would be a question whether the "entry," being dependent upon status, would survive his change of status and remain available to serve as a predicate for deportation after he was later expatriated. A still broader question would be whether Congress, in legislating for the deportation of aliens, had in mind the peculiar problems raised by expatriation and would have intended expatriates to be deportable on the basis of their conduct while holding fully-perfected citizenship.

Our purpose is not to express a view as to the merits of those arguments but only to suggest that it is upon broad questions such as those that the deportability of expatriates would turn. Certainly, if there are any reasons why expatriated citizens are not or might not be deportable for pre-expatriation conduct, it is not because § 241(a)(4) uses the word "is" rather than "has been", a ground which, as we have shown, would in any event apply to only one of the many deportation provisions and, even as to that

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
WAYNE G. BARNETT,
STEPHEN J. POLLAK,
Assistants to the Solicitor General.
BEATRICE ROSENBERG,
DON R. BENNETT,
Attorneys.

OCTOBER 1963.

---

one provision, would exempt only pre-expatriation *convictions* and not, as any rational distinction would suggest, pre-expatriation *conduct*. Concern for the problems presented by expatriation ought not, in short, cause any hesitancy to reject the arguments made by petitioner here.

APPENDIX

Sections 241 and 340 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1251 and 1451, provide in pertinent part as follows:

SEC. 241 (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General be deported who—

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives

of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

* * * * *

SEC. 340 (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization [1] were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *.

* * * * *

(f) Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship under the provisions of subsection (a) of this section on the ground that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which he may have, now has, or may hereafter acquire under and by virtue of such naturalization of such parent or spouse, regardless of whether such person is residing within

[1] Subsequent to the events involved in this case, the Act of September 26, 1961, § 18, 75 Stat. 656, inserted the words "were illegally procured or" at the point indicated.

or without the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship. Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization under the provisions of subsections (c) or (d) of this section, or under the provisions of section 329 (c) of this title on any ground other than that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which would have been enjoyed by such person had there not been a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization, unless such person is residing in the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
[illegible]
[illegible], CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR THE PETITIONER

EDWARD BENNETT WILLIAMS,
HAROLD UNGAR,
1000 Hill Building
Washington 6, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

D

INDEX

	Page
I. The construction of Section 241(a)(4)	1
A. Eichenlaub v. Shaughnessy is not authority for construing Section 241(a)(4) as applying to petitioner	2
B. The principle of Fong Haw Tan v. Phelan dictates a construction of Section 241(a)(4) as not applying to petitioner	3
II. The relation-back provision of Section 340(a)	4
A. There was no pre-existing judicial doctrine—for this court to have unsettled in Eichenlaub v. Shaughnessy—that denaturalization relates back for the purpose of deportation	5
B. The legislative history of Section 340(a) discloses no intent that the relation-back language should apply for the purpose of deportation	7
Conclusion	12

TABLE OF AUTHORITIES

CASES:

Battaglino v. *Marshall*, 172 F. 2d 979 (2d Cir. 1949), *cert. denied*, 338 U.S. 829 ..... 6, 7
Bolter, In re, 66 F. Supp. 566 (S.D. Cal. 1946) 6, 7
Brancato v. *Lehmann*, 239 F. 2d 663 (6th Cir. 1956) ... 5, 6
Cepo v. *Brownell*, 147 F. Supp. 517 (N.D. Cal. 1956) ... 7
Eichenlaub v. *Shaughnessey*, 338 U.S. 521 ..... 2, 3, 4, 5, 7, 8, 9, 10, 11
Eichenlaub v. *Watkins*, 167 F. 2d 659 (2d Cir. 1948), affirmed *sub nom. Eichenlaub* v. *Shaughnessey*, 338 U.S. 521 ..... 5, 9
Findan, In re, 4 F. Supp. 189 (D.R.I. 1933) 6
Fong Haw Tan v. *Phelan*, 333 U.S. 6 ..... 3, 4, 12
Johannessen v. *United States*, 225 U.S. 227 6
Manha v. *Brownell*, 146 F. Supp. 411 (N.D. Cal. 1956) .. 7
Rosenberg v. *United States*, 60 F. 2d 475 (3d Cir. 1932), *cert. denied*, 287 U.S. 645 6
Willumeit v. *Watkins*, 171 F. 2d 773 (2d Cir. 1949), affirmed *sub nom. Willumeit* v. *Shaughnessey*, 338 U.S. 521 ..... 5, 9

Page

STATUTES:

Act of June 29, 1906, § 15, 34 Stat. 601 ..... 6, 7

Immigration and Nationality Act of 1952:

§ 241(a)(4), 8 U.S.C. § 125(a)(4) 1, 2, 3, 4
§ 340, 8 U.S.C. § 1451 7
§ 340(a), 8 U.S.C. § 1451(a) 4, 7, 8, 11, 12
§ 340(e), 8 U.S.C. § 1451(e) 7
§ 340(f), 8 U.S.C. § 1451(f) 7, 8

Nationality Act of 1940:

§ 338(a), 54 Stat. 1158 ..... 6, 7
§ 338(d), 54 Stat. 1159 ..... 6, 7

MISCELLANEOUS:

Besterman, *Commentary on the Immigration and Nationality Act*, 8 U.S.C.A., Part 1, p. 1, 3 ..... 10, 11
H. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 7
S. 716, 82d Cong., 1st Sess. 10
S. 2055, 82d Cong., 1st Sess. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR THE PETITIONER

I. THE CONSTRUCTION OF SECTION 241(a)(4)

From the very beginning of the proceedings against him, petitioner has argued that § 241(a)(4), authorizing deportation of an "alien . . . who . . . is convicted", makes him deportable only if he was an alien when he was convicted.

The Government has now, for the first time, apparently conceded that petitioner's interpretation is permitted by the language of the statute.[1] It contends, however, that the contrary interpretation is required by *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, construing what respondent calls "substantially identical language."[2] It also contends that the contrary interpretation, authorizing petitioner's deportation even though he was not an alien when he was convicted, is the more natural and logical of the two interpretations permitted by the statutory language.

We submit that respondent's first contention cannot be supported and that its second contention, even if true, is ineffective to sustain the deportation order.

A. Eichenlaub v. Shaughnessy Is Not Authority for Construing Section 241(a)(4) as Applying to Petitioner

The *Eichenlaub* statute applied to "aliens who since August 1, 1914, *have been or may hereafter be convicted* . . . ." The Court, emphasizing the very language here emphasized (338 U.S. at 530), concluded:

> ". . . Congress, in 1920, evidently wanted to provide a means by which to free the United States of residents who (1) had been or thereafter were convicted of certain offenses against the security of the United States, (2) had been or thereafter were found, after hearing, to be undesirable residents of the United States, and (3) being aliens were subject to deportation. Congress said just that." 338 U.S. at 532-33.

The inference is thus inescapable that the *Eichenlaub* holding was based on the statute's use of the dual tense

---

[1] Respondent's Brief, pp. 9-10.

[2] *Id.*, p. 18.

verbs "have been or may hereafter be". Despite the various dicta in the opinion, it would be impossible to maintain, in the light of the holding, that the Court would have reached the same construction had the statute merely said "may hereafter be". *Eichenlaub* is, therefore, not controlling authority over the instant statute.

B. The Principle of Fong Haw Tan v. Phelan Dictates a Construction of Section 241(a)(4) as Not Applying to Petitioner

The majority in *Eichenlaub*, as shown by the above-quoted holding, found no ambiguity in the 1920 statute. It saw no occasion, therefore, to invoke the principle of *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10, relied on by the dissent. The dissent, finding the statute ambiguous despite the dual tense verbs, said:

> "... Where, as here, a statute permits either of two constructions without violence to language, the construction which leads to hardship should be rejected in favor of the permissible construction consonant with humane considerations." 338 U.S. at 534.

We think we have shown in our main brief that § 241(a)(4) is at least ambiguous, if indeed, it does not plainly omit petitioner from its coverage. In any event, respondent seems now to have conceded that the words of the statute are susceptible of the interpretation petitioner urges. This is a situation, therefore, calling for choice of petitioner's interpretation, since it is "consonant with humane considerations" and can be reached "without violence to language."

Once finding that the words of the statute permit a construction which avoids deportation, the Court should be drawn, by its confirmed philosophy in de-

portation cases, to the conclusion that the favorable construction must apply. See cases cited in the *Eichenlaub* dissent, 338 U.S. at 533.[3] Respondent's argument that the construction less favorable to the alien is more logical is unavailing, whether or not it be true, for, as the unanimous Court said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10:

> "... To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

II. THE RELATION-BACK PROVISION OF SECTION 340(a)

Respondent devotes over half of its argument to an attempted demonstration that the relation-back provision of the denaturalization statute was intended by Congress to make deportable under § 241(a)(4) an individual who was convicted of crimes between naturalization and denaturalization. The burden of respondent's argument is as follows: (1) that case law had established that denaturalization for fraud relates back for deportation purposes; (2) that this Court's *Eichenlaub* opinion unsettled that established proposition and invited Congress to settle it dispositively by legislation; and (3) that in the "dialogue between Court and Congress," which "was direct and sharply defined,"[4] the response of Congress was the insertion of the relation-back language in § 340(a) of the 1952 Act.

---

[3] See also cases cited in Petitioner's Brief, p. 17, n. 17.

[4] Respondent's Brief, p. 36.

A. There Was No Pre-Existing Judicial Doctrine—for This Court to Have Unsettled in Eichenlaub v. Shaughnessy—That Denaturalization Relates Back for the Purpose of Deportation

Notwithstanding its most strenuous efforts, respondent has pointed to no decision of any court extending the relation-back doctrine to deportation, with the single exception of the Second Circuit opinions in the *Eichenlaub-Willumeit* cases. And when those cases reached this Court, approval of that extension was withheld. Thus the Sixth Circuit Court of Appeals was able to say in 1956 in *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666:

> ". . . We have no difficulty in giving a retroactive effect to the denaturalization order in view of the authorities supporting such a ruling. But the Government has cited us no case from the Supreme Court or the U. S. Courts of Appeals which has gone the additional step and given such relation-back construction to the deportation statute. It was urged upon the Supreme Court in United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529, 70 S. Ct. 329, 94 L. Ed. 307, where the Court found that a ruling on the question was unnecessary for a disposition of the case. We think that the Court's later ruling in Barber v. Gonzales, supra, 347 U.S. 637, 642, 74 S. Ct. 822, 98 L. Ed. 1009, indicates disapproval of a relation-back construction."

Apart from the Second Circuit's abortive extension of relation-back to deportation cases (which the Government failed even to cite to the *Brancato* court), there is no great mystery about the pre-1952 state of the case law on the relation-back theory. As respondent points out, revocation of naturalization was first

authorized in the Naturalization Act of June 29, 1906, § 15, 34 Stat. 601. That authorization was retained in the Nationality Act of 1940, § 338(a), 54 Stat. 1158. There was no question that the 1906 Act made a nullity of citizenship cancelled for fraud. *Johannessen* v. *United States*, 225 U.S. 227, 240-41. It was equally clear that revocation for fraud related back to vitiate derivative citizenship. *Rosenberg* v. *United States*, 60 F. 2d 475 (3rd Cir. 1932), *cert. denied*, 287 U.S. 645. What respondent fails to note, however, is that *Rosenberg* limited the relation-back concept to derivative citizenship, saying, "The question of the right of the Government to deport is not here involved." 60 F. 2d at 476. See also the language quoted from *Brancato*, *supra*.

Although there was no doubt of the relation back of a denaturalization grounded on actual fraud, there were conflicting decisions on the relation back of denaturalizations under the 1906 Act based on grounds other than actual fraud.[5] It was held in *Battaglino* v. *Marshall*, 172 F. 2d 979 (2d Cir. 1949), *cert. denied*, 338 U.S. 829, that a denaturalization for "presumptive fraud" based on an individual's return to his native land for permanent residence related back to vitiate derivative citizenship. Other courts, however, held, in similar circumstances, that the denaturalization did not relate back to affect derivative citizenship unless there was "actual fraud." *In re Bolter*, 66 F. Supp. 566 (S.D. Cal. 1946); *In re Findan*, 4 F. Supp. 189 (D.R.I. 1933). It was against this background of case

[5] Under the 1940 Act, derivative citizenship was affected only if the denaturalization was for "actual fraud." Sec. 338(d), 54 Stat. 1159.

law that the 1952 statute was adopted,[6] not against a background of an allegedly "settled" principle of relation back of denaturalization for the purpose of deportation, allegedly unsettled by this Court's *Eichenlaub* opinion.

B. The Legislative History of Section 340(a) Discloses No Intent That the Relation-Back Language Should Apply for the Purpose of Deportation

In § 340(e) of the new statute, 8 U.S.C. § 1451(e), Congress preserved the provision of the 1940 Act saving derivative citizenship in denaturalizations under that act upon grounds other than actual fraud. In § 340 (f) it set forth the circumstances under which derivative citizenship could be affected by denaturalizations under the new act. And, in § 340(a), it changed the grounds of denaturalization from fraud and illegal procurement to procurement "by concealment of a material fact or by willful misrepresentation". This last change was considered by Congress of major importance and, indeed, is the only provision of § 340 which is referred to in the legislative history. See H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), U.S. Code Cong. and Adm. News 1653, at 1741 (1952).[7]

---

[6] Although this conflict in the decisions related only to denaturalizations under the 1906 Act, cases under that act continued to arise long after the 1940 statute was adopted (see *Battaglino* v. *Marshall* and *In re Bolter*, *supra*) and, indeed, even after the 1952 Act was passed. The conflict is dramatically illustrated by two virtually simultaneous decisions by separate judges of the same court in 1956. Compare *Cepo* v. *Brownell*, 147 F. Supp. 517 (N.D. Cal.), with *Manha* v. *Brownell*, 146 F. Supp. 411 (N.D. Cal.).

[7] The House Report's reference to § 340, quoted in full, states:

"4. *Judicial Revocation of Nationality*

One of the major changes in existing nationality law provided by the bill is contained in section 340 which authorizes

Since the legislative history is completely silent as to the purpose of including the relation-back provision in § 340(a), we cannot, as seemingly the Government would have us do, dispositively prove that Congress intended only to affect derivative citizenship. We submit, however, that, in the light of (1) the conflicting decisions on whether it takes "actual fraud" to affect derivative citizenship by relation back of denaturalization, and (2) the substitution of new grounds of denaturalization for the fraud and illegal procurement grounds of the pre-existing statutes, the most likely reason for the insertion in § 340(a) of the relation-back language was to make certain that no court would interfere with the legislative intent that derivative citizenship be affected as provided in § 340(f). We submit that this reason for insertion of the language is certainly more likely than that suggested by respondent.

Respondent contends that the intent of Congress in inserting the relation-back clause was to settle a theretofore accepted proposition, allegedly unsettled by this Court in *Eichenlaub*, that denaturalization relates back to make the individual deportable for acts occurring while he held citizenship. This contention, we submit, is grounded upon fallacies and non-sequiturs and has not a shred of support in the legislative history.

In the first place, as we have shown, respondent is wrong in assuming that, before this Court's *Eichen-*

---

revocation of naturalization. Under the provisions of section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or was procured illegally.

The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation."

laub opinion, there was a settled application of the relation-back concept to deportation. In fact, the concept had *never* been so applied, except in the Second Circuit's *Eichenlaub-Willumeit* opinions, which, until now, the Government has treated as what they really were—an abortive attempt to extend the relation-back concept to deportation. When this Court chose not to adopt the lower court's theory, therefore, it did not unsettle an accepted principle; it simply aborted an attempted venture into new ground.

From the false premise that this Court had raised a dramatic challenge in its *Eichenlaub* opinion, respondent takes off on a bold flight of fancy. It declares:

> "The dialogue between Court and Congress was direct and sharply defined, and, if by the enactment of the relation-back provision of § 340(a) Congress did not succeed in preventing the use petitioner seeks to make of his cancelled naturalization, it cannot be on the ground that that was not the Congressional will."[8]

This "direct and sharply defined" dialogue consisted, on the part of the Court, of the opinion handed down on January 16, 1950, and, on the part of Congress, of the introduction on August 27, 1951, more than nineteen months later, of a bill containing the relation-back language. Respondent can point to no language in any committee report or hearing or debate giving the slightest inkling that the relation-back language was occasioned in any way by this Court's *Eichenlaub* opinion. Moreover, the fact that a compendious report and an omnibus bill on immigration and naturalization were filed on April 20, 1950, without

[8] Respondent's Brief, p. 36.

any mention of that opinion or any relation-back provision, is ignored by respondent on an assumption that the legislative report process is too cumbersome to register events only ninety-four days old.[9] We suggest the possibility that, for so dramatic an event as a challenge which opens a "dialogue . . . direct and sharply defined", some staff member would have found a way to revise a page-proof.

Even if one indulges in respondent's assumption, there is still a long road to travel before one can accept respondent's "dialogue" theory. The bill introduced on April 20, 1950, was thereafter submitted to further study by a group of experts from the Department of State, the Immigration and Naturalization Service and the professional staffs of the Judiciary Committees of the House and Senate. "The bill was revised in detail and redrafted in a series of meetings during which suggestions of governmental and non-governmental agencies and institutions were received, analyzed and discussed." Besterman, *Commentary on the Immigration and Nationality Act*, 8 U.S.C.A., Part 1, p. 1, 3. The revised version, S. 716, 82d Cong., 1st Sess., was introduced on January 29, 1951, more than a year after the *Eichenlaub* opinion. Surely, even respondent would agree that there was time enough for some reaction to *Eichenlaub* to have manifested itself if there were any such reaction. But the new bill, like the old one, said nothing about relation back. Nor did the Department of Justice's section-by-section analysis of S. 716 give any indication of any purpose to have denaturalization relate back for the purpose of deportation.[10] In March and April of 1951, joint hear-

[9] Respondent's Brief, p. 31.

[10] See Petitioner's Brief, pp. 29-30, n. 20.

ings were held by subcommittees of both Judiciary Committees at which over sixty witnesses testified and numerous statements were submitted.[11] Respondent can point to nothing in the transcript of those hearings to suggest that anyone was reacting to *Eichenlaub*.[12] Not until a new "omnibus bill", S. 2055, 82d Cong., 1st Sess., was introduced on August 27, 1951, over nineteen months after *Eichenlaub*, did the relation-back language make its appearance. To respondent, this "belated addition . . . suggests irresistibly" that Congress was reacting to this Court's unsettling of the allegedly settled application of the relation-back doctrine for the purpose of deportation.[13]

We submit that respondent's contention is far from irresistible. We think the Court should reject it for the following reasons:

(1) As we have shown, there was no settled application for this Court to have unsettled in *Eichenlaub*.

(2) In the nineteen months after *Eichenlaub*, not only Congress, but also the immigration experts of the Department of Justice, had neglected repeated opportunities to react to this Court's allegedly unsettling opinion.

(3) Respondent cites nothing but its own conjectures to support its contention that the 1952 enactment of § 340(a) was Congress' response to *Eichenlaub*. Presumably, so important a purpose would have found some expression at some point

---

[11] Besterman, *op. cit. supra*, p. 3.

[12] See Respondent's Brief, p. 34, n. 18.

[13] *Id.*, p. 35.

in the voluminous legislative history. All that the history shows, however, is that Congress' concern was the substitution of new denaturalization grounds for the fraud and illegal procurement grounds of the earlier statutes.[14]

(4) At least as probable as respondent's contention is petitioner's suggestion that the relation-back language was inserted in § 340(a) simply to put an end to the conflict of decisions as to the effect of denaturalization on derivative citizenship. The Court should, therefore, resolve any ambiguity in petitioner's favor. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

CONCLUSION

For the reasons stated herein and in petitioner's main brief it is respectfully submitted that the judgment of the court below should be reversed.

EDWARD BENNETT WILLIAMS,
HAROLD UNGAR,
1000 Hill Building
Washington 6, D. C.
Counsel for Petitioner

[14] *Supra* note 7.